

# Plenary Power and Constitutional Outcasts: Federal Power, Critical Race Theory, and the Second, Ninth, and Tenth Amendments

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## I. INTRODUCTION

The dramatic expansion of federal power since the New Deal has produced profound doctrinal, social, and political changes. It also presents a profound paradox. While expansive federal power has been an engine for advancement of progressive ideals, it also is a threat to the liberty those ideals seek to enhance. For American minorities, the paradox is striking.<sup>1</sup> Expanded federal power has yielded the benefits and protections of the civil rights era. But the foundation of that power is a constitutionalism that unbridles collective power and thus invites majoritarian abuses.

The danger grows from the perhaps inevitable conflict between rights and power. Harvard's Richard Fallon has explored this tension, arguing that rights and power in modern American constitutionalism are conceptually interdependent: "We have no way of thinking about constitutional rights independent of what powers it would be prudent or desirable for government to have."<sup>2</sup> In an era where substantive boundaries on federal power seem ephemeral at best, this suggests that what we call rights may be primarily fair weather or illusory barriers to the exercise of power.

However, on at least one view of it, this may be of little practical significance. From a majoritarian perspective, the shifting boundary between rights and powers, and the capacity of power to consume rights, may be unproblematic and even attractive. If the exercise of plenary power reflects majority will, then we might say this exercise renders a balance between rights and powers that best reflects our current problems, ambitions, and fears. Indeed we might view the alternative of a more formalist structure, in which constitutional language imposes (at least until formally changed) solid and frustrating substantive boundaries on power, to be foolishly inflexible.

But this majoritarian critique masks a core danger that is revealed when the issue is viewed from a minority perspective. From a minority perspective the view that conceptually unlimited federal power renders the balance between rights and power that best reflects our current needs is paradoxical at best. Critical race theorists have argued that America's unfailingly majoritarian doctrinal, political, and social framework presents a multitude of dangers and problems that are principal barriers to racial reform. From these critiques, we can understand that dissolving power boundaries might coincidentally produce results beneficial to minority interests (and in the case of 1960s civil rights laws

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<sup>1</sup> From a global perspective, people of color are not minorities. Where efficient, I will use "American" minorities.

<sup>2</sup> Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 344 (1993). Fallon's thesis is the centerpiece of *Georgia Law Review's* 1993 Symposium Issue.

vitaly important results) but will not predictably yield the balance of rights and powers that minorities would consider prudent, necessary, or attractive. The dilemma and danger for minorities is that plenary power tethered merely by majoritarian preferences and necessities leaves minorities simply to gamble on the direction of future swings in the mood of the majority.

This danger drives the framework of this Article. Part II constructs the position that the conceptual interdependence of rights and powers in a plenary power environment (a) renders rights illusory, and (b) tethers power to majoritarian preferences and necessities.

Part III tests the assertion of a rights-corroding plenary power constitutionalism, by examining three provisions of the Bill of Rights that in the modern era have been disparaged, ignored, and essentially cast out of the Constitution—the Second, Ninth, and Tenth Amendments.<sup>3</sup> Part III posits that the illusion of rights in plenary power constitutionalism can only be maintained convincingly where the right is grounded in values that are nominally independent of the principle of limited federal power. I argue that the perceived and relative absence of such independent values in these three outcast provisions, their more direct dependency on the principle of limited power and pervasive conflict with plenary power, explains their condition as outcasts. That condition, I contend, is evidence of a plenary power constitutionalism that can only feign to respect rights where it is possible to submerge their dependency on the principle of limited power.

Part IV engages, from a critical race perspective,<sup>4</sup> the idea that the only harness on plenary power is a practical one defined by prevailing political preferences and perceptions of necessity. In that exercise, I illustrate the paradox of the plenary power constitutionalism for brown<sup>5</sup> people. Building

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<sup>3</sup> It is my implicit contention that exercises in rights protection are primarily fair weather efforts. I have not attempted to make this case directly. Nor have I speculated what it would take for particular rights to fall to majoritarian fears or passions; rather, I make this case by inferences from ideas that remain in our constitutional text but have fallen out of our modern jurisprudence.

<sup>4</sup> See, e.g., Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993) [hereinafter Delgado & Stefancic, *Critical Race Theory*] (extensive bibliography identifying and describing ten major themes that broadly characterize critical race theory); see also Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography 1993, A Year of Transition*, 66 U. COLO. L. REV. 159 (1995) [hereinafter Delgado & Stefancic, *Critical Race Theory 1993*] (updated bibliography of works in critical race theory).

<sup>5</sup> I use “brown” because black is underinclusive and misdescriptive. I have always thought of myself as black. I came of age as colored and negro were phasing out—a time when “black” was pulled out of the pool of epithets and elevated. See Clayton P. Alderfer & David A. Thomas, *The Significance of Race and Ethnicity for Understanding Organizational*

upon common arguments in critical race theory, Part IV posits that the preferences and necessities that are the practical boundaries on plenary power are inevitably majoritarian, which I contend pressures plenary power constitutionalism to validate exercises of power that are responsive to majoritarian fears or perceptions of necessity.

Under this pressure, plenary power constitutionalism is arguably as great a danger to American minorities as a more formalist, power-limiting constitutionalism that some consider the domain of contemporary political conservatives. But paradoxically, the practical political gains made by minorities in the civil rights movement are grounded solidly in the modern plenary power structure. This paradox generates a concurrent theme in Part IV, one that is implicit in nearly every critical race critique, but which demands explicit attention here.

One of the core controversies in critical race theory surrounds the idea that

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*Behavior*, 1988 INT'L REV. OF INDUS. & ORGANIZATIONAL PSYCHOL. 1, 9 ("The racial and ethnic identification of individuals is not a static condition. [For example,] Cross (1975) analyzed the negro-to-black conversion experience."). But my lineage, like that of many "black" people, includes equally suffering Native Americans and also Europeans who jumped into my gene pool and then fled responsibility. Descriptively, I am brown. My children, who add Poles and Czechs to their family tree, are brown. A full description of ethnicity is a longer conversation.

I gave a speech recently to prospective minority applicants to our law school. I said that the law needed them not for their "beautiful brown faces," but because of their different perspectives and experiences. I did not say "black faces" because everyone was brown. Descriptively, brown is more inclusive.

The disconnection we are forced into through use of the narrower label "black" is illustrated in Kim Crenshaw's description of the exploitation of brown people for political purposes: "Morgan recounts how the planters 'lump[ed] Indians, mulattoes and Negroes in a single slave class,' and how these categories became 'an essential if unacknowledged, ingredient of the republican ideology that enabled Virginians to lead the nation.'" Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1374 (1988) (quoting EDMUND MORGAN, *AMERICAN SLAVERY—AMERICAN FREEDOM* (1975)). The Indians and arguably the mulattoes to which Morgan initially refers fit into the shorthand "black" only if we expand the term well beyond its descriptive boundaries.

I do not use "African-American" because it is not nationality or African culture that binds brown people. Rather, it is the fact that our brown skin threatens to earn us different treatment—mostly poor. This experience we share regardless of country of origin. See generally Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle As Racial History*, 34 ST. LOUIS U. L.J. 425 (1990) (recounting majoritarian mistreatment of Native Americans, Chinese laborers, Bracero programs, and racist immigration quotas to show majoritarian mistreatment of minorities for psychic or pecuniary advantage).

scholars of color possess special perspectives on legal and social questions. It is argued that this “voice of color”<sup>6</sup> can produce uniquely outsider critiques of law and policy that cannot be duplicated by non-minorities. Moreover, some contend that minority scholars, particularly if they depart from traditional or dominant minority views, can shift out of voice and instead reflect a majority perspective.<sup>7</sup> These contentions open important debates about the functions, boundaries, and ultimate utility of voice of color.

It is especially appropriate that I engage these questions here, particularly the idea that voice does not permit certain unorthodox views since, in the process of illustrating the paradox of plenary power, I construct both orthodox and counter-instinctive minority critiques of plenary power constitutionalism and the outcast provisions. The orthodox critique concludes that the outcast provisions are unlikely sources of salvation for minorities and that minorities cannot sensibly withdraw support for plenary power constitutionalism because it is the foundation for vital legislative gains. The counter instinctive critique is grounded, ironically, in observations from critical race scholarship about the capacity of collective ideals to shame majorities into corrections of conditions that violate those ideals—a force that critical race scholars argue substantially influenced the gains of the civil rights era. From this critique we can understand institutional and cultural fidelity to limited power to be precisely the type of collective ideal that restrains majoritarian power—a restraint that plenary power constitutionalism corrodes.

From the idea that these drastically divergent positions can be pursued solidly within voice of color, Part IV.C moves toward the broader claim that voice may prompt diverse, nontraditional routes through which scholars of color and brown people generally can approach social, doctrinal and policy choices, but is ill equipped to command particular selections among those choices.

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<sup>6</sup> The initial controversy has been over the very existence of “voice.” For a general overview of the voice of color debate, see Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2062 (1991) (“I contend that the debate over the *existence* of the voice of color has concluded.”).

<sup>7</sup> Jerome Culp suggests that battles over the existence and character of voice of color confuse “voice,” which all scholars of color have, with “black perspective,” which has tighter boundaries and requirements. See Jerome McCristal Culp, Jr., *Voice, Perspective, Truth and Justice: Race and the Mountain in the Legal Academy*, 38 LOY. L. REV. 61, 68 (1992). I believe this distinction is false and that there are as many variations of both voice and black perspective as there are variations in race experiences. The existence of these variations does not diminish the fact that, driven by broadly similar interests, we can and should link arms. But, in the details, there is no solid basis for asserting that some perspectives are blacker than others.

## II. RIGHTS POWER DISSONANCE IN A PLENARY POWER ENVIRONMENT

Chief Justice Rehnquist has called the principle of limited federal powers "one of the greatest 'fictions' of our federalist system."<sup>8</sup> Richard Epstein observes, "Today's welfare state rests on a construction of the commerce clause that grants the federal government jurisdiction so long as it can show (as it always can) that the regulated activity . . . affects interstate commerce, however indirectly."<sup>9</sup> Robert Bork contends that "the expansion of Congress's commerce, taxing and spending powers has reached a point where it is not possible to state that, as a matter of articulated doctrine, there are any limits left."<sup>10</sup> Predictably, the most caustic observations about the plenary nature of federal power in modern America<sup>11</sup> arise as conservative complaints. But with the progressive agenda grounded solidly on expansive federal power, there is understandably no liberal disagreement rigorous enough to offer substantive power boundaries.<sup>12</sup>

The Court's most recent and candid engagement of modern plenary power appears in *United States v. Lopez*,<sup>13</sup> which has been the only significant defeat of federal commerce power since the 1930s. Responding to what was a very standard rendition of the power-sustaining construction of the Commerce Clause—an unremarkable position that had been overwhelmingly successful for decades<sup>14</sup>—the Court in *Lopez* concluded:

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<sup>8</sup> *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 307 (1981) (Rehnquist, J., concurring).

<sup>9</sup> Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1387 (1987).

<sup>10</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1990).

<sup>11</sup> I refer here not to Congress's acknowledged plenary power over interstate commerce, see *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 17, 46, 197 (1824), but rather to the controversial transformation of that power over commerce into power over virtually everything.

<sup>12</sup> There are of course numerous liberal projects focusing on rights, in which it is assumed those rights act as independent constraints on government power. The position here is that they do not function as such, absent a serious affirmative commitment to limited power. See *infra* text accompanying note 23.

<sup>13</sup> 115 S. Ct. 1624, 1634 (1995) (striking down the Gun Free School Zones Act as an unconstitutional assertion of commerce power). Alfonso Lopez was prosecuted under the Act for violating the federal prohibition against possession of a firearm within the federally defined school zone. *Id.* at 1626.

<sup>14</sup> Justice Breyer articulated this position in his dissent:

[T]he majority's holding runs contrary to modern Supreme Court cases that have upheld

Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate. . . .

....

Admittedly, some of our prior cases have taken long steps down [the road toward converting the commerce power into a general police power]. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated . . . .<sup>15</sup>

While there is obvious tension between the rhetoric of *Lopez* and the contention that federal power remains effectively plenary, I argue in Part III.B that the impact of *Lopez* on the plenary power structure should be gauged not by its power-limiting rhetoric, but by the Court's treatment of the remaining outcast provisions in its wake. Pending those signals, I proceed under the view, reflected in part by Justice Souter's dissent, that the majority's "reasoning and its suggestions [are] not quite in gear with the prevailing standard, but [*Lopez* is] hardly an epochal case."<sup>16</sup> For the moment, it is a fair premise that the plenary power model, with perhaps a soft spin to the right, survives *Lopez*.

The implications of plenary power constitutionalism are profound. Instinctively one is left to wonder, if power is plenary what are we to make of rights? Are they merely comforting symbols that survive in fair weather but wither in the storm of exigency?<sup>17</sup> Separately, if federal power has no

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congressional actions despite connections to interstate or foreign commerce that are less significant than the [connections in this case] . . . .

....

. . . [T]he Court's holding . . . threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled. . . .

. . . Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten.

115 S. Ct. at 1662, 1664, 1665 (Breyer, J., dissenting).

<sup>15</sup> *Id.* at 1632, 1634.

<sup>16</sup> *Id.* at 1657 (Souter, J., dissenting).

<sup>17</sup> Milner Ball observes:

According to one "familiar understanding," the primary defense against abuse of power is not rights but the division of power: "Political Liberty is to be found . . . only

conceptual limits, what sets its transient practical boundaries? Can we say that anything other than prevailing perceptions of prudence and necessity harness it?

Richard Fallon's conceptual interdependence project helps us engage these questions. The idea that rights wither against necessity-driven plenary power is readily drawn from Fallon's claim that rights and powers are conceptually interdependent.<sup>18</sup> Fallon argues, "[We] have no way of thinking about constitutional rights independent of what powers it would be prudent or desirable for government to have. . . . Modern constitutional discourse tends to blur analysis of the scope of governmental powers with assessment of practical necessity."<sup>19</sup> He contends that conceptual interdependence is exhibited most clearly in cases involving the Court's amorphous balancing test.<sup>20</sup> But even for "rights-protective" doctrine, he argues, the "crucial conceptual point is that practical necessity limits the right. The right is not defined by some process independent of and external to consideration of the sensible scope of government powers."<sup>21</sup> Self-consciously, Fallon ponders whether "the claim that individual rights are too conceptually interconnected with government powers to function as independent constraints may seem so obvious as to be unilluminating."<sup>22</sup>

Fallon presents Ronald Dworkin's "rights thesis" as representative of the best projects which urge, contrary to Fallon's view, that we can derive rights

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when there is no abuse of power[.] . . . To prevent this abuse, it is necessary from the very nature of things that power should be a check to power." Accordingly, our constitutional system divides power between state and federal government and then among the branches of each.

Milner S. Ball, *Afterthoughts*, 27 GA. L. REV. 473, 478 (1993) (quoting CHARLES D. MONTESQUIEU, *THE SPIRIT OF LAWS* 69 (Thomas Nugent, trans. 1952) (1748)).

<sup>18</sup> See Fallon, *supra* note 2, at 344-45.

<sup>19</sup> *Id.* at 348; see also Epstein, *supra* note 9, at 1392 ("The rationale for limited government became obscure in an age when the Progressive tradition of good government came to dominate American intellectual life. Judges who were persuaded that national solutions were needed for national problems could hardly be expected to invoke the commerce clause as a barrier . . .").

<sup>20</sup> See Fallon, *supra* note 2, at 360.

<sup>21</sup> *Id.* at 360-61. Approaching the point at which he diverges from Fallon, Professor Friedman candidly describes federal power as an outgrowth of necessity. See Barry Friedman, *Trumping Rights*, 27 GA. L. REV. 435, 451 (1993). I discussed this phenomenon in an earlier examination of the Tenth Amendment in the context of an arguably unconstitutional environmental statute. See Nicholas J. Johnson, *EPCRA's Collision with Federalism*, 27 IND. L. REV. 549 (1994). As Friedman points out, it is not always readily ascertainable what "practical" necessity requires. This difficulty will have its own variable restraining influence on the practical boundaries of power. See Friedman, *supra*, at 453.

<sup>22</sup> Fallon, *supra* note 2, at 344.



independent of any consideration of the powers government should have—that rights trump power. He contends that Dworkin's willingness to "weight" rights is an essential acknowledgment that rights "cannot be defined independently of an inquiry into the powers of government."<sup>23</sup> Thus "even the most staunchly rights-based of contemporary constitutional theories accepts [the conceptual interdependence of rights and powers] as a fact that must be explained and rationalized."<sup>24</sup>

Fallon ultimately concludes that conceptual interdependence can be handled in a way that takes rights seriously. It requires an honest balancing<sup>25</sup> of rights interests against power interests in which both rights and powers have a genuine chance to prevail.<sup>26</sup> This necessity for balancing, he contends, has important implications for the type of judges we ought to prefer and for the areas of law in which courts should adopt a more aggressive role.<sup>27</sup>

Here I depart from Fallon. I contend that in a plenary power environment, a balance between rights interests and power interests cannot be struck in a way that truly respects rights—that conceptual interdependence in a plenary power environment renders rights merely fair weather protections. Fallon's own

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<sup>23</sup> *Id.* at 370–71 (critiquing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977)).

<sup>24</sup> *Id.* at 371.

<sup>25</sup> In a critique of balancing, Barry Friedman notes that the difficult job of quantifying the state's interest "is cake compared to the individual right side. . . . This subjectivity of valuing interests may be the very point best made by *Sitz*. . . . The majority characterized the intrusion as 'slight.' Justice Stevens conjured up images of terror and Nazi Germany." Friedman, *supra* note 21, at 454, 457.

Inserting an injured minority right should make this problem utterly intractable. Indeed, Justice Stevens's observation in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 463 (1990) (Stevens, J., dissenting), that some citizens, even law-abiding ones, will view a random check roadblock as far more than a slight intrusion, should resonate deeply for brown people. See also Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1974 (1990) (arguing that members of the Supreme Court hail mostly from the majority and therefore cannot easily decide a case in a counter-majoritarian manner).

<sup>26</sup> Fallon offers several ideas geared to facilitate this result. See Fallon, *supra* note 2, at 361. He argues for a broad judicial role in which judges must be very careful in deferring to "more competent" experts in weighing competing rights and power interests. He notes the temptation to defer to experts but emphasizes the danger that, while experts on the scene surely may know more than courts about the interests supporting claims of government power, they may be less sensitive to the interests underlying claims of constitutional rights. See *id.* at 382.

<sup>27</sup> See *id.* He also contends that judges' central mission of balancing rights interests against power interests has implications for the type of justices we ought to select and for the doctrinal areas in which courts should adopt a more aggressive role. See *id.* at 382–89; see also Richard H. Fallon, Jr., *Further Reflections on Rights and Interests: A Reply*, 27 GA. L. REV. 489, 500 (1993).

illustrations of conceptual interdependence in operation help build the fair weather rights point. For example, even for "presumptively protected rights" the scope of those rights, Fallon contends, "depends pervasively on a balancing of the interests underlying the rights against the interests supporting the recognition of governmental powers."<sup>28</sup> In a discussion of presumptively protected speech, he suggests that the boundary of the right is found where power interests outweigh speech interests or at the point where precluding government from protecting nonspeech interests would produce unacceptable results.<sup>29</sup>

Inherent in this argument is that both rights interests and power interests can evolve and the line of demarcation can oscillate to expand or constrict the scope of either rights or powers. However, the absence of solid power-limiting principles in plenary power constitutionalism,<sup>30</sup> and the enormous resources committed to developing and sustaining power-asserting legislation, makes the collective impulse to exert power to solve new and growing problems a much more dynamic and dominant force in this balance.<sup>31</sup> Rights-protecting efforts,

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<sup>28</sup> Fallon, *supra* note 2, at 362.

<sup>29</sup> *Id.* Although Fallon's thesis speaks principally in terms of a conflict between "rights interests" and "power interests," it does periodically reflect the idea of necessity-driven plenary power that helps frame my analysis. In his transition into a different aspect of the analysis, Fallon summarizes: "So far I have been talking about explicit judicial balancing of asserted private rights against the claimed practical necessity of upholding government power." *Id.* at 361. Fallon also reflects this idea as he ponders the significance of the conceptual interdependence thesis, noting that it might fairly be cast as "the necessary compromise of a body of law committed to individual rights with an unhappy and recalcitrant reality." *Id.* Finally, Fallon writes of the Court's attention to "the practical need for government to be able to regulate even-handedly, without recognizing exceptions to generally prevailing duties for those with religious reasons for non-compliance." *Id.* at 363 n.81 (citing *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 878-80, 889-91 (1990) (finding the Free Exercise Clause does not preclude enforcement of state statute proscribing ingestion of peyote against persons using it as part of religious ritual)).

<sup>30</sup> The idea that rights trump powers is not the type of textual power-limiting principle to which I refer. See *supra* text accompanying notes 23-24.

<sup>31</sup> In a discrete example, Fallon observes something similar: "[W]ithin our constitutional order, the well-being, agency, and dignitary interests that underlie rights frequently are treated as being of lesser weight than the interests that support assertions of governmental power." Fallon, *supra* note 2, at 365.

It is not surprising that the Court has acknowledged the power of emergency circumstances to dissolve principled limitations on power. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Court acknowledged:

The limits imposed upon the commerce power when Congress seeks to apply it to the

dependent substantially on private initiative and resources, pale in comparison. This dominance of power interests invites a decline toward fair-weather rights that function only so long as there is an inadequate perception of need for rights-dissolving assertions of power.<sup>32</sup>

This contention is difficult to prove because the provisions that have become the core conception of the Bill of Rights are grounded to different degrees in a variety of values that nominally can sustain rights, independent of any consideration of the boundaries of power.<sup>33</sup> These nominally limited-power-independent values permit us to talk about and enforce certain rights as if they were solid, self-sustaining constraints on power. Their illusory character is difficult to demonstrate absent sufficiently severe political or social foul weather in which I contend plenary power will dissolve rights.<sup>34</sup>

However, Part III demonstrates that there are certain provisions of the Bill of Rights—the Second, Ninth, and Tenth Amendments—wherein the conflict between constitutional protections and plenary power is more open. These provisions are less susceptible to an illusory rhetoric of respect because they are only minimally, if at all, grounded on limited-power-independent values. The principle of limited federal power is the predominant value that frames them. The outcast status of these provisions can be explained by the conceptual interdependence thesis and is inferential evidence of a plenary power constitutionalism that renders rights illusory generally.<sup>35</sup>

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States are not so inflexible as to preclude temporary enactments tailored to combat a national emergency. “[A]lthough an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.”

*Id.* at 853 (quoting *Wilson v. New*, 243 U.S. 332, 338 (1917)).

This remark was a comment on the decision in *Fry v. United States*, 421 U.S. 542 (1975), which allowed Richard Nixon’s wage and price controls as a response to “an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall.” *National League*, 426 U.S. at 853.

<sup>32</sup> This notion suggests a partially dormant plenary power that submerges the inevitable rights-powers dissonance and permits us to talk about rights as though they have independent substantive power.

<sup>33</sup> Such limited-power-independent values seem to be at the core of rights based theories such as Dworkin’s, which claim that rights have independent force. See *supra* text accompanying notes 23–24.

<sup>34</sup> Turned more finely, a risk exists under a traditional power-limiting structure as well. As I will argue in Part IV, open adherence to plenary power unleashes majoritarian excesses earlier. See *infra* Part IV.A.

<sup>35</sup> Since I have included the Tenth Amendment in my list of outcasts, I am of course

A separate implication of plenary power constitutionalism—that power is harnessed merely by prevailing political preferences and perceptions of prudent or necessary problem-solving—tempts us to consider the illusory rights observation unproblematic. Indeed, we might prefer a structure that grants us conceptually unlimited power to solve our problems. We might say that structure provides precisely the balance of rights and powers that best respects our current values and serves our current interests. Fallon's vision of an appropriate balance struck between rights interests and power interests seems to rest on this idea.

But that vision stops short of an important question that exposes the dangers and the paradox of the plenary power model: What exactly do “we” mean by “our” sense of prudent or necessary problem solving?<sup>36</sup> *Whose* interests are we talking about? One might respond again, *ours—American* interests. But critical

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taking liberty by using the term “rights” as a short hand—the same license taken when we refer to the “Bill of Rights.” What I identify are barriers that protect a category of interests against assertions of federal power. As the Court recognized in *New York v. United States*, 505 U.S. 144, 181 (1992), federalism protects the interests of individuals, not just states or state officials.

<sup>36</sup> Professor Tribe, for example, urges that our view of the Constitution should not be limited by the wooden intentions of the framers, but rather should grow in the model of the common law. See LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* (1991). Susan Estrich contends that this view is attractive in part because it renders the “right results.” See Susan Estrich, Book Review, *HARV. L. BULL.* 24 (Oct. 1991) (reviewing TRIBE & DORF, *ON READING THE CONSTITUTION*).

If one has faith that we will wisely and fairly use the capacity to make whatever national decisions seem prudent and necessary, it is easy to endorse Estrich's critique of Tribe's position. But from a critical race perspective, detached from traditional political allegiances, this common law framework is troublesome. It is grounded on our common experience, our shared values. If the experience and perspectives that drive the common law are majoritarian experiences that devalue minority interests, the model is problematic. Moreover, if the constitutional touchstone is merely whether government action is responsive to a current problem, it leaves outsiders with no good conceptual foundation for claiming that majority power is being used unconstitutionally against them.

While overtly flexible constitutional schemes are offered mainly by liberals and progressives of goodwill, it would be foolhardy for brown people to permit past allegiances to pull us down a path that requires more trust in the institutions of American government than is deserved. See also Derrick A. Bell, Jr. & Preeta Barsal, *The Republican Revival and Racial Politics*, 97 *YALE L.J.* 1609, 1619 (1988) (critiquing Frank Michelman's and Cass Sunstein's theory that republicanism can lead to fuller participation in public life for minorities and voicing skepticism about its reliance on courts to recognize “voices from the margin”); Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 *COLUM. L. REV.* 1547 (1991) (arguing that liberalism today is practically bankrupt as a source of civil rights reform).

race theorists have argued that those interests, preferences, and necessities are unfailingly majoritarian.<sup>37</sup>

In his first annotated bibliography of the discipline, Richard Delgado identifies as one of the major themes of critical race theory the lament "that a principle obstacle to racial reform is majoritarian mindset—the bundles of presuppositions, received wisdoms, and shared cultural understandings" that undergird American doctrinal, social, and political decisions.<sup>38</sup> Mainstream writers have made roughly parallel claims. Thomas Merrill notes, "To be sure, political scientists have persuasively argued that the Court inevitably conforms its views about the Constitution to the demands of the dominant political coalition."<sup>39</sup>

Toward the extremes this majoritarian mindset presents a substantial danger for outsiders, particularly in a scheme where power is conceptually unbridled. Political theorist John Rawls makes the point aggressively: "[I]n the long run a strong majority of the electorate can eventually make the constitution conform to its political will. This is simply a fact about political power as such. There is no way around this fact . . . ."<sup>40</sup>

Importantly, Rawls's observation reveals that the alternative to plenary power constitutionalism, a model of claimed fidelity to limited power, is itself only a transient barrier to majoritarian abuses. Consequently, the value of cultural and institutional fidelity to limited power will not be to bar majoritarian abuses. If it has any virtue, it is to delay them. Drawing upon critical race theory projects that critique rights discourse as contingent and transient, but still vital to the interests of minorities, I argue in Part IV that fidelity to limited power is a conceptually interconnected and equally vital protection of minority

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<sup>37</sup> Fallon cites *Korematsu v. United States*, 323 U.S. 214 (1944), to illustrate the presence of conceptual interdependence in even the "most rights-protective" doctrine: "Government can regulate even political speech, for example, to serve a compelling governmental interest. Government can also use racial classifications if the need is perceived as sufficiently urgent." Fallon, *supra* note 2, at 360. *Korematsu* illustrates the relative ease with which majoritarian necessities will trump minority rights in an emergency, even in a structure that rhetorically adheres to power limitations. In a structure without even that rhetorical commitment, the danger of such things is even greater. See also *infra* Part IV.A.

<sup>38</sup> Delgado & Stefancic, *Critical Race Theory*, *supra* note 4, at 462. Delgado presents an array of critical race theory projects that explore the implications of this contention in various doctrinal and policy contexts. See also Abner S. Green, Kiryas Joel and *Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 8–16 (1996) (arguing that assertion of "our" collective interests in resolving the rights/power balance improperly assumes legitimate sovereignty over religious minorities).

<sup>39</sup> Thomas W. Merrill, *A Modest Proposal for a Political Court*, 17 HARV. J.L. & PUB. POL'Y 137, 145 (1994).

<sup>40</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 233 (1993).

interests.

If this is so, then American minorities must grapple with the paradox that plenary power constitutionalism has cut a path toward our liberation, and yet, where minority interests conflict with the majoritarian ambitions or fears, remains a fundamental danger. Part IV engages that paradox.

### III. TRASHING FOR INSIGHT

"I draw your attention to the curious incident of the dog that did nothing in the night-time."

Sherlock Holmes <sup>41</sup>

Suzanna Sherry observes that the Ninth Amendment "is often lumped with the Second, Third and Tenth, as one of those amendments that doesn't mean anything today."<sup>42</sup> My aim here is to examine the nature of power and the condition of rights in modern constitutionalism by rummaging through the constitutional ashpile, on the suspicion that what we have thrown out reveals as much as a shelf-full of fair-weather rhetoric. What inferences can we draw then from the dearth of Second and Ninth Amendment jurisprudence and a Tenth Amendment that came within a whisker of being construed into oblivion?<sup>43</sup>

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<sup>41</sup> I have taken liberties with Conan Doyle in presenting Holmes's observation about the significance of things absent. For the full exchange between the fictional sleuth and Inspector Gregory, see SIR ARTHUR CONAN DOYLE, *Silver Blaze*, in *THE MEMOIRS OF SHERLOCK HOLMES* (1894), reprinted in *THE COMPLETE SHERLOCK HOLMES* 347 (Doubleday 1988).

<sup>42</sup> Suzanna Sherry, "Without Virtue There Can Be No Liberty," 78 MINN. L. REV. 61, 65 (1993).

<sup>43</sup> See discussions of *New York v. United States*, 505 U.S. 144 (1992), and *United States v. Lopez*, 115 S. Ct. 1624 (1995), and *infra* Part III.B. See also William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1239 (1994) (discussing how the Second Amendment has generated almost no useful body of law). Professor Van Alstyne contends that the absence of useful modern case law on the Second Amendment is not due to the absence of occasion to develop such law—"[s]o much is true only of the Third Amendment." *Id.* Query whether serious people would consider the Third Amendment to be an inviolate barrier against the emergency of housing troops in private homes. The plenary power structure leaves this question open. I do not include the Third Amendment in my list of outcasts because it is less openly limited-power-dependent.

### A. *The Outcast Provisions: A Shared Dependency on Substantive Power Boundaries*

Evaluated independently, the Second, Ninth, and Tenth Amendments have been dubbed “embarrassing,”<sup>44</sup> “terrifying,”<sup>45</sup> “forgotten,”<sup>46</sup> “mysterious,”<sup>47</sup> “missing”<sup>48</sup> and “dead.”<sup>49</sup> But they may share more than just outcast status. I propose that they have been independently disparaged for a common reason: They appear at the top of a hierarchy of rights that depend increasingly for their cogency on the constitution’s battered power-limiting principles.

As described above, Professor Fallon argues that rights and powers are conceptually interdependent; but certain rights may be more dependent on limited power than others.<sup>50</sup> As Richard Epstein observes:

If the constitutional limitations on federal powers were designed to act as a substitute Bill of Rights, then the expansive interpretation of the commerce clause has done away with this protection completely. The necessary effect is that greater burdens are placed upon the substantive limitations, such as the Bill of Rights, found elsewhere in the Constitution. These limitations have met with varying fates themselves . . . . In some cases, the second barrier against expanded government has held. In other cases, chiefly those concerning economic liberties, it has crumbled, leaving liberty at the mercy of the “good faith” of the Congress whose mischief the barrier was designed to constrain.<sup>51</sup>

Randy Barnett makes the point in a different context. In a criticism of the

<sup>44</sup> See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 637 (1989).

<sup>45</sup> See David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 551 (1991).

<sup>46</sup> See BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 1–3 (1955).

<sup>47</sup> See Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 143 (1988).

<sup>48</sup> See Philip P. Frickey, *Lawnet: The Case of the Missing (Tenth) Amendment*, 75 MINN. L. REV. 755, 755 (1991).

<sup>49</sup> See George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363, 363 (1985).

<sup>50</sup> While a hierarchy of interdependence is not a prominent theme of Fallon’s project, his application of conceptual interdependence in four distinct contexts shows that it operates differently in each, indicating his core recognition of gradations of interdependency. Fallon works the concept in the contexts of the balancing test, presumptively protected rights, rights deriving from concerns about powers, and constitutional remedies. See Fallon, *supra* note 2, at 360–68.

<sup>51</sup> Epstein, *supra* note 9, at 1397.

dominant "rights powers" conception of the Ninth Amendment, he illustrates that certain rights are more explicitly dependent on limited power than others. He contends, for example, that we cannot glean a right to a speedy and public trial by jury or freedom from unreasonable searches and seizures simply by determining what is left over from a limited delegation of powers.<sup>52</sup>

Inverting his example we can understand that the content and framing of particular rights-protecting provisions can affect our capacity to contemplate them in the face of plenary power. Barnett's example offers a model in which the outcasts differ in important degree from provisions that are more firmly grounded in values that thrive seemingly independently of a commitment to limited federal power. For those provisions, firmly grounded in limited-power-independent values, we nominally can consider the parameters of the right, in the context of its driving values, without thinking about federal power boundaries. These nominally limited-power-independent values mask the rights-eviscerating effect of plenary power.

It is, for example, possible to contemplate the "proper" parameters of the right to speak freely by focusing on its driving values to construct an image that fulfills those values. Fallon illustrates the phenomenon in his example of the distinct interests we can contemplate in defining prohibited child pornography: "How much speech of how much value is lost under one or another definition of prohibitible child pornography?"<sup>53</sup> Importantly, the second part of Fallon's question (What is the speech's value?) is separable and distinct from the first (Is this speech at all?). The second question—the value of the speech—turns ultimately on the power side of the equation: "What harms would occur to which power interests if the value of the speech is deemed to outweigh power interests?"<sup>54</sup> The fact that we can contemplate the first question separately from the second—that is the qualification of the phenomenon as nominally protected speech, apart from the quantitative measure of its speech value and the power interests necessary to overtake it—shows that we can superficially debate rights without reference to their underlying dependency on limited power. At a deeper level the right is still conceptually dependent on substantive power boundaries, and where they conflict, plenary power always can dissolve the right. But in many circumstances, the right's foundation in separate and distinct values permits us to describe it as a substantive protection and submerges the limited-power-dependency that renders it illusory.<sup>55</sup>

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<sup>52</sup> See Randy E. Barnett, *James Madison's Ninth Amendment*, in 1 RIGHTS RETAINED BY THE PEOPLE 11 (Randy Barnett ed., 1989) [hereinafter 1 RIGHTS RETAINED].

<sup>53</sup> Fallon, *supra* note 2, at 373.

<sup>54</sup> *Id.*

<sup>55</sup> If we conflate the two questions—is it speech and what is its value—the second question drives us to a rights dissolving inquiry: Is there no set of governmental needs



In contrast, the outcast provisions are more openly grounded on the principle of limited federal power. Honest efforts to understand and use them cannot easily escape a search for federal power boundaries. It is the practical absence of such boundaries that makes the outcasts so difficult to contemplate. Here, where conceptual interdependence is hard to submerge, the condition of the outcast provisions is evidence of a plenary power constitutionalism that renders rights illusory.<sup>56</sup>

### 1. *The Tenth Amendment*

The idea of reserved powers embodied in the Tenth Amendment, by its very formulation, requires serious initial consideration of federal power boundaries. Modern Tenth Amendment jurisprudence has shown that it has been extremely difficult to talk about reserved state powers within a framework of conceptually unlimited federal power.

*National League of Cities v. Usery*<sup>57</sup> was one of the most notable episodes, since the New Deal, in which the Court tried to frame the parameters of a

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sufficient to negate the bar on content based restrictions? In time of national emergency or panic, would we really protect dissident speech where we believed it threatened our national survival?

<sup>56</sup> I am of course attempting to make this case indirectly, by reference to things missing. Others, proceeding directly, have made similar and broader claims. See, e.g., Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867 (1994) (critiquing governmental power generally). Robin West summarizes Brownstein's project this way:

The crux of his argument . . . is that . . . the fundamental-right, strict-scrutiny formula that *Casey* appears to reject has always been something of a mirage. Truth is, we don't have any fundamental rights not subject to state regulation, and all *Casey* does, and entirely to its credit, is give us a workable formula that better fits the reality of what we do have—rights of varying degrees of importance that can be regulated, limited, or defined by state action so long as the burdens thereby imposed are not undue. The jurisprudential importance of *Casey*, in other words, is that it forces us to a newly explicit acknowledgment of what in reality is a quite old conception of rights: The assertion of a right operates not as a trump, but rather as the opening to a regulatory conversation, in which the collective, or the community, or the society, through the mechanism of state regulation, defines as well as limits and burdens the content of the right.

Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of Casey*, 45 HASTINGS L.J. 961, 961–62 (1994).

<sup>57</sup> 426 U.S. 833 (1976).

substantive Tenth Amendment.<sup>58</sup> Attempting to avoid application of federal wage and hour guidelines to state workers, the National League of Cities argued that the Tenth Amendment operated as a "trump" on federal powers, in the same way, for example, as the Fifth and Sixth Amendments.<sup>59</sup> As I have suggested, a crucial difference is that the values that influence the substance of provisions like the Fifth and Sixth Amendments are nominally limited-power-independent.<sup>60</sup> A substantive Tenth Amendment in contrast depends at every stage of consideration upon real federal power boundaries.

The *National League* majority fashioned the conception of traditional state functions as a foundation for a substantive Tenth Amendment that evidently could trump exercises of federal power.<sup>61</sup> But the idea confounded lower courts and the Supreme Court itself.<sup>62</sup> There was nothing extraordinarily complex about the concept. The remarkable thing was the disharmony of reserved state powers on a practical constitutional canvas of plenary federal power.

It is instructive then, that relatively quickly on the heels of *National League*, the Court abandoned the search for protected traditional state functions as unworkable. In *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>63</sup> the majority reflected the concern of lower courts that "[d]espite the abundance of adjectives, identifying which particular state functions are immune remains difficult."<sup>64</sup>

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<sup>58</sup> See *id.* at 842-43 (citing *New York v. United States*, 326 U.S. 572, 587-88 (1946) (rejecting the proposition that Congress could impose taxes directly upon states)).

<sup>59</sup> See *id.* at 841.

<sup>60</sup> As I have said, this limited-power-independence permits us to surround these amendments with a superficial rhetoric of respect, even though plenary power is sufficient to obliterate them where the need is great.

<sup>61</sup> See *National League*, 426 U.S. at 851. The Court said,

These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens. If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' "separate and independent existence."

*Id.* (quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911)).

<sup>62</sup> See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 538 (1985) (providing a list of conflicting cases).

<sup>63</sup> 469 U.S. 528 (1985).

<sup>64</sup> *Id.* at 538 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 557 F. Supp. 445, 447 (W.D. Tex. 1983)).

Informed by the conceptual interdependency thesis, this difficulty is easy to understand. Rejecting "a static historical view of state functions generally immune from federal regulation,"<sup>65</sup> the Court invited a search for reserved state powers in an environment where solid limits on federal power were, as a matter of articulated doctrine, nonexistent. The Court's dynamic view of reserved state functions forced a concession to the reality of plenary federal power. It is then no surprise that the *Garcia* majority found "the notion of a 'uniquely' [state] governmental function . . . unmanageable."<sup>66</sup> The only thing more difficult to contemplate is the constellation of powers the Tenth Amendment reserves to the people themselves.<sup>67</sup>

Left then to determine the powers reserved to the states under the Tenth Amendment, the Court returned explicitly to what always was the central point: "They retain those not transferred to the Federal Government."<sup>68</sup> Tending to confirm the contention that we have no framework for sounding the limits of that category, the Court shifted back immediately to the question of explicitly reserved state powers, to find in Article IV, section 3, a single example of reserved state powers in the form of state territorial integrity.<sup>69</sup> The Court moved swiftly from this perfunctory example to construct a procedural model of state sovereignty. In a move the dissenters argued rendered Congress self-policing and neutered the Tenth Amendment,<sup>70</sup> the majority suggested that the

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<sup>65</sup> *Id.* at 540 (quoting *Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678, 686 (1982)).

<sup>66</sup> *Id.* at 545. The Court of course casts the explanation in different terms. The problem, it said, is that such a wide array of activities are open to and demanded of states, that it is difficult to identify those which are traditional or integral. *Id.* at 546. But the point remains that our general conventions and practices made it hard to contend that any of this "wide array" of activities was beyond the scope of federal power.

<sup>67</sup> "Those powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

<sup>68</sup> *Garcia*, 469 U.S. at 549.

<sup>69</sup> U.S. CONST. art. IV, § 3.

<sup>70</sup> In dissent, Justice Powell criticized:

[T]oday's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause. . . .

. . . .

. . . [F]ederal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power. . . .

. . . .

. . . [The majority] does not identify even a single aspect of state authority that would remain when the Commerce Clause is invoked to justify federal regulation.

Tenth Amendment is respected primarily by states' participation in the national legislature and the national political process.<sup>71</sup> Later, in *South Carolina v. Baker*,<sup>72</sup> the Court pondered whether one of the last kernels of a substantive Tenth Amendment, a barrier against federal control of the state legislative process, survived *Garcia*.<sup>73</sup>

The nearly closed question contemplated by *Baker* set the stage for a meager but illustrative revival of a substantive Tenth Amendment in *New York v. United States*.<sup>74</sup> The important lesson from *New York* is the contrast between the analytical models employed by the majority and the dissent.<sup>75</sup> Tracing the historical advance of the commerce power (and the corresponding decline of reserved state powers) beyond the model constructed by the framers, the majority reinfuses substance into the Tenth Amendment by preserving what one might easily consider among the last items on any list of reserved state powers—the freedom of state legislators to exercise or refrain from exercising their power to make state law.

In contrast, the severity of the problem addressed by the suspect legislation drives Justice White's *New York* dissent. Summarizing his disagreement with the majority, White argues that the majority "undervalued the effect that the seriousness of this public policy problem should have on the constitutionality of the [legislation]. . . . The imminence of a crisis in low-level radioactive waste management cannot be overstated."<sup>76</sup> In a model where plenary power is guided by prevailing preferences and perceptions of necessity, White's characterization of the problem is virtually dispositive. In a model of solid power boundaries drawn in a principled way from a power-delineating document, it is only background.

The difficulty of sustaining *National League's* conception of a Tenth Amendment trump value, the Court's quick abandonment of the idea as unworkable, and the last neutering details addressed in *Garcia* and *Baker*, support the contention that the condition of the Tenth Amendment is explained by its direct, debilitating conflict with plenary federal power. The appearance of

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469 U.S. at 560, 567, 579 (Powell, J., dissenting).

<sup>71</sup> See *id.* at 550–52. Had the Court solidified that position it would have been unnecessary to discuss the Tenth Amendment again, except in remarkable cases where a state's representatives were somehow obstructed from participating in federal legislative decisions.

<sup>72</sup> 485 U.S. 505 (1988).

<sup>73</sup> See *id.* at 513.

<sup>74</sup> 505 U.S. 144 (1992).

<sup>75</sup> Compare *id.* at 149–88 (majority) with *id.* at 188–210 (White, J., concurring in part and dissenting in part).

<sup>76</sup> *Id.* at 190 (White, J., concurring in part and dissenting in part).

*New York v. United States* and *United States v. Lopez*<sup>77</sup> requires separate reconciliation that I will undertake in Part III.B. Pending that reconciliation, the recent condition of the Tenth Amendment can be understood as a result of its frontal conflict with plenary federal power.

## 2. *The Ninth Amendment*

There is little controversy over the origins of the Ninth Amendment.<sup>78</sup> We know that it evolved in the context of concerns that explicit enumeration of rights was redundant, since rights were protected by a narrowly circumscribed delegation of federal powers. We also know that the precise impulse prompting it was a fear that enumeration of certain rights would lead to the inference that the vast array of rights left unimpaired by the limited delegation of federal power had been replaced with the scant few that became the Bill of Rights.<sup>79</sup>

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<sup>77</sup> 115 S. Ct. 1624 (1995).

<sup>78</sup> See, e.g., Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 101 (1987) ("It is generally recognized that the Ninth Amendment was proposed by James Madison in response to fears that a specific enumeration of rights in the form of a Bill of Rights might someday be interpreted so as to defeat or belittle rights not included in such an enumeration.").

<sup>79</sup> Richard Epstein comments, "Hamilton treated jurisdiction as a more effective guarantor of individual rights than a bill of rights, because he believed that it provided clear and powerful lines to keep government from straying beyond its appointed limits." Epstein, *supra* note 9, at 1390. Hamilton had written:

I go further, and affirm that bills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

*Id.* at 1390 n.7 (quoting THE FEDERALIST No. 84, at 559 (Alexander Hamilton) (Modern College Library ed., 1937)). Suzanna Sherry notes,

Eighteenth century Americans passionately believed that their most important liberties came not from written bills of rights . . . James Iredell told the North Carolina ratifying convention[:] "It would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation." . . . Madison eventually solved the problem by including the Ninth Amendment in the Bill of Rights.

The controversy emerges instead as we try to conceive the Ninth Amendment's operational role in modern America.<sup>80</sup> The Ninth Amendment's confirmation of a constellation of rights existing outside the boundaries of enumerated federal powers is critically dependent upon the conviction that boundaries on federal power in fact exist. Plenary power dissolves those boundaries.

Speculating on the absence of Ninth Amendment jurisprudence, Knowlton Kelsey suggested that unenumerated Ninth Amendment rights "may have been extinguished by long acquiescence of the people in legislative extension of federal power or by judicial decisions on the extent of power."<sup>81</sup> Randy Barnett states matter-of-factly that the Ninth Amendment has floundered in the wake of a rights-powers conception of it, which identifies Ninth Amendment rights as the residual or negative image of federal power.<sup>82</sup> In a plenary power environment this dominant rights-powers conception is confounded by conceptual interdependence.<sup>83</sup>

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Suzanna Sherry, *supra* note 42, at 62, 65; see also *infra* note 83, for a summary of the Ninth Amendment roots described in Justice Goldberg's concurrence in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>80</sup> See, e.g., Raoul Berger, *Suzanna and—the Ninth Amendment*, 1994 B.Y.U. L. REV. 51 (1994). According to Berger,

Suzanna Sherry pronounces that the "debate over the meaning of the ninth amendment is essentially over . . . [A]ll but one contributor [to a recent symposium] agreed that the ninth amendment does protect judicially enforceable unenumerated rights." Sherry is long on assertion but short on facts. A fellow symposiast, Andrzej Rapaczynski, wrote that "for every interpretation that sees the [Ninth Amendment] as support for judicial activism there is another, respectable one, that does not."

*Id.* at 51 (quoting Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1988), reprinted in 2 THE RIGHTS RETAINED BY THE PEOPLE 283, 283 (Randy E. Barnett ed., 1993) [hereinafter 2 RIGHTS RETAINED] and Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution*, 64 CHI.-KENT L. REV. 177 (1988), reprinted in 2 RIGHTS RETAINED, at 163, 163).

<sup>81</sup> Knowlton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 320 (1936).

<sup>82</sup> See Barnett, *supra* note 52, at 6. Thomas McAfee labels Ninth Amendment rights under the rights-power conception "residual rights." See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1220 (1990).

<sup>83</sup> It is, however, challenging to square the rights-power construction of the Ninth Amendment with a subsequent constitutional history in which the Bill of Rights have been at least partially incorporated as limitations on states. How would the Ninth Amendment, so interpreted, be incorporated? Very clearly the original scope of state powers exceeded that of the federal government. Construing incorporated Ninth Amendment rights as the residual of

On the rights-powers view of it, the Ninth Amendment resists the cloak of rhetorical respect because (like the Tenth Amendment) it clashes frontally with plenary power and lacks independent foundational values that nominally would detach Ninth Amendment rights from limited-power-dependency. As I have said, such limited-power-independent values and the protections grounded on them are, when pressed, no constraint on plenary power. But they are a necessary component of the rhetoric that sustains rights in fair weather.

There have been, however, notable scholarly efforts to establish an independent-values foundation on which to construct Ninth Amendment

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narrowly circumscribed federal power translates into a barrier on federal police powers but should not similarly restrain states. Either the Ninth Amendment is not amenable to incorporation, or its incorporation would require identification of certain fundamental unenumerated rights that states could not infringe. The question is whether such rights properly would be considered a subset (at least partially) of inverted-power Ninth Amendment rights.

Justice Goldberg's concurrence in *Griswold v. Connecticut*, 381 U.S. 479 (1965), engages both the rights-power view of the Ninth Amendment and a fundamental rights view. Arguably Goldberg's "fundamental" Ninth Amendment rights are properly a subset of originally conceived residual Ninth Amendment rights. If they are, then the notion of two spheres of Ninth Amendment rights might not diminish the conceptual interdependence critique. The absence of federal power limitations from which to draw operating negative image rights (which subsume fundamental rights that also restrain the states) might remain a dramatic barrier to invigorating the Ninth Amendment.

Considering the Court's efforts to date in drawing unenumerated penumbral rights from other parts of the text, it is difficult to say the Court has trespassed upon some obvious textual delegation of power. If considered in the context of a similar federal intrusion, the penumbral right to privacy or association might just as fairly have emerged from a finding that there was no federal power to intrude into those matters. At least so far, it is possible to say that the fundamental unenumerated rights discovered by the court fit within a notion of residual Ninth Amendment rights—that is, a traditionally understood commerce power (as conceived, for example, by Epstein, *supra* note 9) would reach them only after tremendous difficulty. It remains plausible then to conceive of fundamental Ninth Amendment rights as a subset of residual rights. This view sustains the utility of the conceptual interdependence critique with respect to the Ninth Amendment.

Indeed, even scholarly efforts that would ground Ninth Amendment rights in natural law conceptions of individual liberty seem compelled to consider the expressly delegated powers of the federal government as a limitation on those pre-existing rights. See, e.g., BENNETT B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT*, excerpted in 1 RIGHTS RETAINED, *supra* note 52, at 107–08. At the outset, Patterson, while contending that the Ninth Amendment recognizes rather than creates "individual sovereignty in the realm of natural and inherent rights," confronts the reality that the Framers' "theory of the Constitution was that it was only a body of powers which were granted to the government." *Id.* This statement acknowledges, if only indirectly, the legitimacy of restraints on those pre-existing rights within the boundaries of delegated powers.

rights.<sup>84</sup> But the absence of explicit textual support for these limited-power-independent values leaves some of the more aggressive efforts open to the criticism that they grow merely from the political preferences of their advocates.<sup>85</sup>

A less dramatic construction of limited-power-independent Ninth Amendment rights appears in the concurrence by Justice Goldberg in *Griswold v. Connecticut*.<sup>86</sup> Through his discussion of origins and history of the Ninth Amendment, Justice Goldberg indicates that Ninth Amendment rights are constituted, at least in part, of the negative image of federal power.<sup>87</sup> But he also suggests that the Ninth Amendment confirms a realm of fundamental individual rights that limit state action as well.<sup>88</sup>

Ultimately Goldberg conceives the Ninth Amendment's independent-rights-value as less purely substantive and more a rule of construction for the Constitution—an affirmation of the Court's development of unenumerated penumbral rights from explicit textual protections. While more modest in its consequences than many, this approach is in the same general vein as scholarly efforts to enliven the Ninth Amendment with limited-power-independent values.<sup>89</sup>

This type of approach, animating the Ninth Amendment with nominally

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<sup>84</sup> See, e.g., 1 RIGHTS RETAINED, *supra* note 52; 2 RIGHTS RETAINED, *supra* note 80 (compiling an array of scholarly treatments of the Ninth Amendment).

<sup>85</sup> See, e.g., Berger, *supra* note 80, at 59–61. Berger criticizes Suzanna Sherry's argument for an enlivened Ninth Amendment, calling it "a fancy way of saying that a judge is free to substitute whatever meaning he chooses. . . . Implicit in Sherry's fancy theorizing and that of her fellows is a confession of failure to obtain from the people the measures they desire." *Id.*

<sup>86</sup> 381 U.S. 479 (1965).

<sup>87</sup> See, e.g., Berger, *supra* note 80. In his concurrence in *Griswold v. Connecticut*, Justice Goldberg recounts Justice Story's *Commentaries*, which invite the rights-powers construction of the Ninth Amendment:

In regard to . . . [a] suggestion that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis. . . . But a conclusive answer is that such attempt may be interdicted (as it has been) by a positive declaration in [the Ninth Amendment].

*Griswold*, 381 U.S. at 490 (Goldberg, J., concurring) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 626, 627 (5th ed. 1891)). Arguably, modern America has witnessed the expansion of power Story urges could never be sustained.

<sup>88</sup> *Griswold*, 381 U.S. at 492–93.

<sup>89</sup> See, e.g., 1 RIGHTS RETAINED, *supra* note 52; 2 RIGHTS RETAINED, *supra* note 80.



independent rights values, might allow Ninth Amendment jurisprudence to develop even in the face of conceptually unlimited federal power. This developing jurisprudence might remove the Ninth Amendment from the group of outcasts, simply by eliminating its status as an indicator of plenary federal power, without any accompanying commitment by the Court to take limited power seriously.<sup>90</sup>

In the meantime, Randy Barnett's assessment is apt: the dominant rights-powers conception of the Ninth Amendment explains its status. So long as this view dominates our understanding of the Ninth Amendment, plenary federal power will render the Ninth Amendment an outcast from the Bill of Rights.<sup>91</sup>

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<sup>90</sup> See Barnett, *supra* note 52, at 6. Barnett contends the rights/powers view is wrong, in part because it is partly responsible for the long-standing neglect of the Ninth Amendment. Barnett brushes against Fallon's conceptual interdependence thesis in his contention that the rights-powers conception renders the Ninth Amendment inapplicable to "any conceivable case or controversy. On the assumption that rights and powers are logically complementary, . . . the focus . . . is entirely on the powers side . . . and the language of the Tenth Amendment." *Id.* at 8. Barnett fails, however, to incorporate the enumerated powers component of this equation. The decisive inquiry into power limits should focus on the Commerce Clause, not the Tenth Amendment. Expansive interpretation of the Commerce Clause confounds both the Ninth and the Tenth Amendments. That these two provisions share a dependency on a principled interpretation of the Commerce Clause is core to their significance as outcasts. Understood this way, the Ninth and Tenth Amendments are similarly afflicted. But contrary to Barnett's critique, their common relationship to the question of federal power boundaries does not render the Ninth Amendment superfluous.

<sup>91</sup> See *id.* at 6. As an introduction to his criticism of it, Barnett illustrates why the rights-powers view has continuing appeal:

The rights-powers conception of the Ninth Amendment views delegated powers and constitutional rights as logically complementary. This approach has two important advantages. First, when rights are viewed as the logical obverse of powers, content can be given to unenumerated rights by exclusively focusing on the express provisions delegating powers. By avoiding the need to directly address the substance of unenumerated rights, the rights-powers conception appears to provide judges with a practical way of interpreting the otherwise open-ended Ninth Amendment. Second, the view that rights and powers are logically complementary seems to avoid any internal conflict or logical contradiction between constitutional rights and powers. In this way the rights-powers conception has the apparent virtue of treating the Constitution as internally coherent.

*Id.*

### 3. *The Second Amendment*

The Second Amendment is semantically closest to other provisions of the Bill of Rights whose language grounds them in values that are nominally limited-power-independent. Indeed, its arguable dual purpose (an affirmation of individual self-defense and a check on abuse of power) offers individual self-defense as a solidly independent rights-value with the capacity to submerge the Second Amendment's limited-power-dependency, thus pushing us to understand its outcast status as something other than a consequence of a frontal conflict with plenary power. And similar to the Ninth Amendment, there has been a great deal of scholarship expounding on that independent rights-value.<sup>92</sup>

The meager efforts of the Court stand in stark contrast. Measured by the Court's single treatment of the Second Amendment in this century,<sup>93</sup> *United States v. Miller*,<sup>94</sup> the Second Amendment is directly and critically dependent on the concept of limited federal powers. *Miller* reached the Court from a decision dismissing the prosecution of the defendant for transporting a short-barreled shotgun, in violation of the National Firearms Act of 1934, on the grounds that the Act violated the Second Amendment. The Court reversed and remanded "in the absence of any evidence tending to show that possession or use of a [short-barreled shotgun] has some reasonable relationship to the

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<sup>92</sup> Overwhelmingly this scholarship finds both the Second Amendment's power limiting value and its affirmation of individual self-defense readily apparent and systematically important. See, e.g., JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS*, 162-63 (1994); see also Nicholas J. Johnson, *Shots Across No Man's Land: A Response to Handgun Control, Inc.'s, Richard Aborn*, 22 *FORDHAM URB. L.J.* 441, 449 n.23 (1995) [hereinafter Johnson, *Shots*] (listing the numerous projects supporting the individual rights view); Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 *RUTGERS L.J.* 1, 1 (1992) [hereinafter Johnson, *Beyond the Second Amendment*] (same).

<sup>93</sup> Another opportunity certainly presented itself in *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (upholding local ban on possession of handguns).

<sup>94</sup> 307 U.S. 174 (1939). Since the framing, the Court has heard only two other cases significantly related to the Second Amendment, *United States v. Cruikshank*, 92 U.S. 542 (1875), and *Presser v. Illinois*, 116 U.S. 252 (1886). *Cruikshank* involved a suit by federal authorities against Cruikshank for violating the rights of two black men by interfering with their right to bear arms. The Court held that the federal government had no power to protect citizens against private action that deprived them of their constitutional rights, and that the Second Amendment was a limitation on Congress, not on private individuals. See *Cruikshank*, 92 U.S. at 542. In *Presser*, the Court concluded that a state statute limiting the bearing of arms was not a violation of the Second Amendment because the amendment was not a limitation on state governments. This decision was prior to the incorporation of any of the Bill of Rights as limitations on states. See *Presser*, 116 U.S. at 267.

preservation or efficiency of a well regulated militia."<sup>95</sup> This language is one impulse for the view that the Second Amendment does not protect individual firearms ownership.<sup>96</sup> However, *Miller's* verification that "the Militia comprises all males physically capable of acting in concert for the common defense [and] expected to appear bearing arms supplied by themselves and of the kind in common usage at the time" is a staple of the individual rights interpretation.<sup>97</sup> But on either view of it, *Miller* arguably still positions the

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<sup>95</sup> *Miller*, 307 U.S. at 178.

<sup>96</sup> It is difficult to pinpoint the emergence of this view of the Second Amendment. However, as Professor Van Alstyne notes, if the states' rights conception of the Second Amendment is accurate, it was one of the best kept secrets of the eighteenth century, "for no known writing surviving from the period between 1787 and 1791 states such a thesis." Van Alstyne, *supra* note 43, at 1243 n.19 (quoting with approval STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 83 (1984)). While others would place it later, Professor Cottrol positions the emergence of the states' rights view more than a century after the framing of the Second Amendment, around the end of the nineteenth century. See Robert J. Cottrol, *The Second Amendment: Invitation to a Multi-Dimension Debate*, in *GUN CONTROL AND THE CONSTITUTION* xxvi (Robert J. Cottrol ed., 1994). Don Kates contends the states' rights view did not appear until this century. See Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 244-45 (1983). Among scholars who have actually done work in the area, the states' rights construction of the Amendment has been overwhelmingly dismissed. For a recent list of the scholarship pro and con see Johnson, *Shots*, *supra* note 92, at 449 n.23. For the best current opposition to the individual rights view see Gary Wills, *To Keep and Bear Arms*, NEW YORK REVIEW OF BOOKS, Sept. 27, 1995, at 62.

<sup>97</sup> *Miller*, 307 U.S. at 179. The Court draws this construction of the militia from "the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators." *Id.* at 179. Notably, the commentaries of Justice Story (invoked with approval in Justice Goldberg's exploration of the Ninth Amendment in *Griswold*) present a similar, arguably ambiguous, construction of the Second Amendment. In 1833 Justice Story wrote:

The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers . . . . The right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually

Second Amendment in terms of its collective, power-limiting value. Focusing on this value casts the Second Amendment as a vital political control—a perhaps impractical or unpalatable, but finally physical, barrier to abusive assertions of power.

There is a frontal and pervasive conflict between plenary power constitutionalism and the concept of a citizens' militia ready to bear arms (either those supplied by their state or their own private arms) as a barrier to abuse of federal power. Thus framed, the Second, like the Ninth and the Tenth

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undermine all the protection intended by this clause of our national bill of rights.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1987) *quoted in* Robert J. Cottrol, *supra* note 96, at xxxvi.

Numerous studies have described the Framers' clear distinction between the militia—consisting of all the people bearing their private arms—on the one hand, and government armed and controlled “select militias” and standing armies on the other. The latter two represent precisely the danger that the militia was intended to oppose. *See, e.g.,* Cottrol, *supra* note 96, at xxxvii. The value of the militia is its detachment from the state, its foundation in “the people.” Today of course, in many venues, this concept is as odd as the Tenth Amendment's declaration of a sphere of power reserved explicitly to “the people.” That such notions are so difficult to contemplate is another reflection of the plenary power structure's departure from the originally contemplated dispersal of power.

In a critique unrelated to constitutional or legal issues, social ecologist Murry Bookchin discusses the connection between an empowered citizenry and the capacity to use force. *See* MURRY BOOKCHIN, THE RISE OF URBANIZATION AND THE DECLINE OF CITIZENSHIP 284–85 (1987). Considered in the constitutional context, this observation underscores the evident connection between what has become the unfathomable power reserved to the people by the Tenth Amendment and the inconceivable militia of the whole described by the Second Amendment:

Power must be conceived as real, indeed solid and tangible, not only as spiritual and psychological. To ignore the fact that power is a muscular fact of life is to drift from the visionary into the ethereal and mislead the public as to its crucial significance in affecting society's destiny. What this means is that if power is to be regained by the people from the state, management of society must be deprofessionalized as much as possible. That is to say, it must be simplified and rendered transparent, indeed, clear, accessible, and manageable such that most of its affairs can be run by ordinary citizens.

Power is also a solid and tangible fact to be reckoned with militarily, notably in the ubiquitous truth that the power of the state or of the people eventually reposes in force. Whether or not the state has power depends upon whether the state exercises a monopoly of violence. By the same token, whether or not the people have power depends upon whether or not it is armed and creates its own grass roots militia, not only to guard itself from criminals or invaders but also from the ever encroaching power of the state itself.

*Id.*

Amendments, is facially dependent on principled federal power boundaries.<sup>98</sup> Absent a serious commitment to those boundaries, it is difficult to visualize ultra vires federal action justifying widespread violent resistance, or even to determine a direction in which to search for the abuse of power that the militia is supposed to resist.<sup>99</sup> The idea is so confounding as to be trivialized<sup>100</sup> and discarded—essentially the status in which the Second Amendment now sits among many<sup>101</sup> in the legal academy, at the bar, and elsewhere.<sup>102</sup>

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<sup>98</sup> It is intriguing to consider that, from a rights perspective, we might have been better off without a Bill of Rights. Absent the false security of these enumerated rights, would we have been so informal about the expansion of powers?

<sup>99</sup> It is difficult to say that the types of affronts that prompted our revolutionary war qualify. Indeed, contemporary complaints of the residents of the District of Columbia about taxation without representation seem almost quaint.

<sup>100</sup> The failure of states' rights advocates to engage the implications of the states' rights view trivializes the Second Amendment. But more than that, it invites the charge that the states' rights view is only a perfunctory attempt to construct an explanation that avoids the individual rights construction. Serious evaluation of the states' rights construction raises extremely troublesome questions that advocates of the position have not discussed—*e.g.*, state acquisition of and preparations with artillery, air power, and weapons of heavy destruction whose control is concentrated in a handful of state officials. This might pose a much more dangerous systemic threat than individual citizens whose collective violent impulse we should expect will be triggered only by very severe abuse. Moreover, taken seriously, the position appears to be inconsistent with Article I of the constitution, allowing states to repeal all federal gun controls within their borders. See Don B. Kates & Glenn Harlan Reynolds, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1742 (1995).

<sup>101</sup> Assuming a prevailing constitutionalism devoid of real federal power boundaries, it is easier to understand contributions like the report of the bar association of the city of New York, declaring that the individual rights reading of the Second Amendment has no constitutional basis. See Committee on Fed. Legislation of the N.Y. City Bar Ass'n., *Federal Gun Control and the Second Amendment*, 48 RECORD 997 (1993) [hereinafter *Federal Gun Control*]. Such a view, says the report, is illogical: "[T]he Constitution's initial purpose was to create government, and it would have been irrational to provide, in the same document, a legal means for its armed destruction." *Id.* at 995. Professor Van Alstyne emphasizes that the language of the Second Amendment refers to the preservation of a *free state*, not the preservation of *the state*, although there are regimes that do enjoy such protection. See *supra* note 43, at 1244. The New York City bar report misses this distinction.

<sup>102</sup> However, its absence in the framework of serious constitutional thought leaves a gaping hole. George Washington is reputed to have said, "Politics is not eloquence or reason, it is force." H.L. MENCKEN, PREJUDICES 221 (2d ser. 1924), *quoted in* JAMES BOVARD, LOST RIGHTS 1 (1994). Absent a counterbalancing capacity for violence in the people, we must depend on process or faith that the enormous power reposed in Washington will be exercised with restraint. For many Americans, such faith would be foolhardy.

#### 4. *Reflections on the Outcasts*

My linkage of the outcast provisions is not, of course, definitive proof of a dominant plenary power constitutionalism that renders all rights illusory.<sup>103</sup> Absent the triggering exigencies that I contend are the only barriers to rights-dissolving exercises of plenary power, it is difficult to demonstrate directly the fair-weather nature of the rights we claim to hold dear. But a basic socratic escalation of the stakes pushes the contention another step forward. If to save the republic we must sacrifice the [insert your favorite here] Amendment, will we do it? Conversely, is there any principle or value, constitutional or otherwise, for which comfortable, rich Americans will sacrifice the order and

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<sup>103</sup> Do the unique histories of the outcast provisions bar the linkages I have described? The decline of the Tenth Amendment is readily linked to the elevation of federal power, but there simply never has been an active Second or Ninth Amendment jurisprudence. Perhaps they just never have come up? Plainly though, the question of unenumerated rights has been one of the burning issues of our generation. The controversy surrounding the right to abortion is the keenest example.

Given the radically different views about the meaning of the Second Amendment and its intersection with various crime control formulae, it is hard to say it has not come up. I have argued elsewhere that the fight over the constitutional status of individual arms is the greatest barrier to building consensus on gun regulation. See Johnson, *Shots*, *supra* note 92. Political reactions against gun regulation that is considered a general threat to gun ownership arguably put the entire liberal agenda at risk. Departing Representative Anthony Beilenson (D. Cal.), a champion of liberal causes who was targeted by the GOP because of his "unswerving loyalty to President Clinton," puts it this way:

I happen to be for reasonable gun control. But we unnecessarily lost good Democratic members because of their votes on the Brady bill and semiautomatic assault weapon ban. I am glad we passed them, but they will have but a modest effect out there in the real world. It was not worth it at all. Why lose 15 good members because they cast a good vote on gun control, which made a modest difference, but their loss made a huge difference?

We lost control of the place, so great damage can be done to seniors, to the environment, to Medicaid because these folks cast principled, good votes on gun control. It wasn't worth it. It's a terrible thing to say, but it's the truth. I don't want any more of our fine colleagues to be sacrificed on the altar of gun control.

Greg Pierce, *Inside Politics*, WASH. TIMES, Nov. 9, 1995, at A6 (quoting E. Michael Myers's interview with Anthony Beilenson); see also Evelyn Theiss, *Clinton Blames Losses on NRA*, PLAIN DEALER, Jan. 14, 1995, at A1 ("The fight for the assault-weapons ban cost 20 members their seats in Congress . . . . The NRA is the reason the Republicans control the house.").

structure on which their comfort depends?<sup>104</sup>

Perhaps it is not mere coincidence that the outcasts languish together on the constitutional ash-heap. Their condition may in fact be explained by their peculiar incompatibility with plenary federal power.<sup>105</sup> It is significant then that we have not been more concerned that these provisions have come to mean nothing in modern America.<sup>106</sup> That we are so untroubled by their condition

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<sup>104</sup> While I have endeavored to make this case by inference from what is missing, others have argued explicitly that rights rhetoric is illusory, even in connection with provisions we purport to take seriously. The most vigorous attack comes from the critical legal studies movement. See, e.g., Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 393 (1988) (arguing from a CLS perspective that rights rhetoric is illusory and dangerous); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363 (1984); see also Friedman, *supra* note 21, at 447 ("Evidently, there is hardly any 'trump' in the right to be free from an unreasonable seizure."). Ronald Dworkin argues that utilitarian and other consequentialist theories aiming to achieve the "best" results fail to take rights seriously. See DWORKIN, *supra* note 23, at ix-xv.

<sup>105</sup> The condition of the outcasts also has implications for the most notable validation of the revolutionary elevation of federal power wrought by the New Deal—Bruce Ackerman's structural amendment project. See Bruce A. Ackerman, *Higher Lawmaking*, in RESPONDING TO IMPERFECTION 63-87 (Sanford Levinson ed., 1995); BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

Professor Fallon observes, "Today, historical limits on the scope of federal powers are generally viewed as anachronisms." Fallon, *supra* note 2, at 349. The expansion of federal power that Ackerman tries to validate pushes us to say the same thing about the outcast provisions. But their continuation in the text and the discord surrounding them underscores a difficulty with structural amendment. It leaves in its wake provisions of the Bill of Rights that one must suppose have been stricken simply by implication. That is an informality of process that invites severe cultural convulsions as factions fight about whether and when things that remain in the text were really eliminated, and when things that are not in the text became guiding principles. The worst part is that only the constitutional priesthood can even approach such questions, making our guiding public document even less accessible to ordinary people.

<sup>106</sup> It may be useful to view these provisions with the recognition that, in the marketplace of ideas, our evaluations depend as much on the presence, power, and resources of the speaker, as the merits of the ideas. We have seen this phenomenon working in two contexts. In the abortion debate, the silent and invisible fetus loses what would be a slam dunk if we had to face her. We watched this play out as well in the O.J. Simpson criminal trial. The victims were absent. Their interests were diminished by the defendant who had a dominant, persistent voice and presence.

Pending the framing of our constitution, the federal government had no significant voice. It was unknown and feared. Currently, through accumulation of power, the federal government has the largest voice in the polity. Our perspective on it and the proper scope of its power are affected by that voice. That voice is in a position diametrically opposite where it began—a shift that contributes to our discovery of mysteries in the provisions that aimed initially to restrain this voiceless suspect.

may be evidence of an attachment to plenary federal power that cuts across ideological lines.<sup>107</sup> I examine that possibility next.

### B. Gauging Lopez

In 1987 Richard Epstein pondered whether his harsh critique of the modern expansive construction of the Commerce Clause was "idle theoretical speculation or [of] profound practical importance."<sup>108</sup> However it may appear, *United States v. Lopez*<sup>109</sup> does not answer his question. While *Lopez* has crashed into the pilings of the elevated Commerce Clause, the results of the collision remain unclear.<sup>110</sup> As Justice Souter contends, *Lopez* seems "hardly . . . epochal."<sup>111</sup> But Souter adds, "Not every epochal case has come in epochal trappings. *Jones and Laughlin* did not reject the direct-indirect [connection to interstate commerce] standard in so many words. . . . But we know what happened."<sup>112</sup>

Ultimately, *Lopez* might merely join *Gregory v. Ashcroft*<sup>113</sup> and *New York v. United States*<sup>114</sup> as another cog in a limited and unremarkable ascension of the Tenth Amendment—a mildly dramatic declaration that police powers are

<sup>107</sup> Sheldon Wolin identifies something similar in an interview with Bill Moyers:

Moyers: [C]onservatism used to be defined by a fear, if not a loathing of government. Now conservatives make reference to the state, and talk at times of President Reagan almost as if he were a sovereign, in the same way the Tories used to talk about George III.

Wolin: It's unfortunately not just conservatives. The so called neo-liberals also have an expanded view of the state. We fight over deregulation or regulation, or this policy or that policy, but we don't talk about the question of state power itself.

BILL MOYERS, A WORLD OF IDEAS: CONVERSATIONS WITH THOUGHTFUL MEN AND WOMEN ABOUT AMERICAN LIFE TODAY AND THE IDEAS SHAPING OUR FUTURE 98 (1989).

<sup>108</sup> Epstein, *supra* note 9, at 1388 (criticizing the dominant modern view of the Commerce Clause as "wrong and clearly so").

<sup>109</sup> 115 S. Ct. 1624 (1995).

<sup>110</sup> See *supra* text accompanying note 16.

<sup>111</sup> *Lopez*, 115 S. Ct. at 1657 (Souter, J., dissenting).

<sup>112</sup> *Id.* Justice Souter refers to *Jones v. Laughlin Steel Corp.*, 301 U.S. 1 (1937), and notes that "[t]he Court's finding that the regulated activity had a direct enough effect on commerce has since been seen as beginning the abandonment, for practical purposes, of the formalistic distinction between direct and indirect effects." *Id.*

<sup>113</sup> 501 U.S. 452 (1991).

<sup>114</sup> 505 U.S. 144 (1992).



reserved to the states. On the other hand, it might signal a new era of principled limitations on federal power. One measure of *Lopez*'s effect will be the Court's treatment of the other two provisions that have been conceptually exiled by an omnipotent Commerce Clause.

Fallon contends that both liberals and conservatives have embraced expanded federal power.<sup>115</sup> Bruce Ackerman observes that conservative Supreme Court Justices typically join liberals in favoring broad interpretations of the government's power.<sup>116</sup> Laurence Tribe has argued that the conservatives on the Court enthusiastically embrace the Tenth Amendment as a principle demanding limitations on federal power, but incongruously are reluctant to deal generously with the Ninth Amendment's promise of unenumerated rights and corresponding limits on power.<sup>117</sup>

As I have said, from a majoritarian perspective, conceptually unlimited power may be attractive.<sup>118</sup> Those Americans relatively secure in their access to collective power might view centuries-old limitations on their capacity to solve problems or to gratify dominant collective preferences to be a foolishly rigid vestige of the past. For mainstream players the only real question may be whether the prevailing agenda for utilizing conceptually unlimited power is in its optimum configuration—that is, have the paths of prudence and necessity been optimally cut.

Viewed cynically, the recent ascension of the Tenth Amendment is merely a rightward spin on this phenomenon—pushing toward a conservative configuration of plenary power constitutionalism and yielding something far less than a principled power-limiting structure. A signal that it is something more—that it is a movement toward principled limitations on federal power—may be the Court's subsequent treatment of the Ninth and Second Amendments.

If the Court truly has restored the principle of limited federal power to modern constitutionalism, then it has a mechanism with which to begin charting the sea of rights that, according to the rights/powers view of the Ninth Amendment, surrounds islands of federal power. Indeed, we might expect the Court's treatment of the Ninth Amendment to be the most dramatic indicator, since opposition to an enlivened Ninth Amendment breaks more cleanly along

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<sup>115</sup> See Fallon, *supra* note 2, at 349–50.

<sup>116</sup> See Bruce Ackerman, *Liberating Abstractions*, 59 U. CHI. L. REV. 317, 317–19 (1992); see also *Fry v. United States*, 421 U.S. 542, 545 (1975) (affirming Richard Nixon's wage and price controls as an admittedly intrusive but temporary enactment tailored to combat a national emergency).

<sup>117</sup> See generally Tribe, *supra* note 78.

<sup>118</sup> See *supra* Part II and *infra* Part IV.

liberal and conservative lines.<sup>119</sup>

However, as I indicated earlier, if Ninth Amendment rights are animated by a fundamental rights analysis, rather than a residual rights analysis, the Ninth Amendment will cease to be an indicator of the scope of federal power. Moreover, depending on the timing, a burgeoning Ninth Amendment jurisprudence might falsely indicate the revival of principled limits on federal power. If the political configuration of the Court shifts, an enlivened Ninth Amendment might emerge from a liberal majority's cynical exploitation of an unprincipled "limited power" foundation that conservatives set with the aim of optimizing, through revitalization of the Tenth Amendment, the plenary power constitutional structure. A Ninth Amendment jurisprudence then could emerge consistent with a continuing attachment (now liberal) to plenary federal power exercised the "correct" way.

The status of the Second Amendment, then, is one<sup>120</sup> remaining barometer of the vitality of the plenary power model and perhaps a better indicator of a principled revival of the constitution's power-limiting principles. The Second Amendment is the bane of brahmans on both the left and the right.<sup>121</sup> It is arguably one of the most socially expensive of the explicit guarantees. If, despite these handicaps, the Second Amendment is lifted by the wave of *Lopez*, it may signal a commitment to principled limits on federal power that seems essential to taking rights seriously.<sup>122</sup>

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<sup>119</sup> See, e.g., Berger, *supra* note 80 (arguing his liberal credentials in spite of the popular contention that opponents of an enlivened Ninth Amendment are primarily neo-conservatives).

<sup>120</sup> There may be others.

<sup>121</sup> Jeffery Snyder contends that, "[i]n addition to being enamored of the power of words, our conservative elite shares with liberals the notion that an armed society is just not civilized or progressive, that massive gun ownership is a blot on our civilization." Jeffery R. Snyder, *A Nation of Cowards*, 113 PUB. INTEREST 40, 40 (1993).

It is interesting to compare the shifting preferences of British elites. Joyce Malcolm recounts the English aristocracy's choice of an armed populace as a check on the power of the crown. In England, as internal political battles came more to be fought with economic and communications weapons, an armed populace no longer served political elites, and the right in England was gently teased away. See MALCOLM, *supra* note 92, at 165-77.

<sup>122</sup> See *infra* Part IV.A (discussing the importance of cultural fidelity to constitutional power boundaries); see also Van Alstyne, *supra* note 43, at 1254.

[The difference between] serious people who are willing to confront serious problems in regulating "the right to keep and bear arms" . . . and others . . . is that such serious people begin with a constitutional understanding that declines to trivialize the Second Amendment . . . or any other right expressly identified elsewhere in the Bill of Rights.

Marginal shifts in the mood of the majority are to be expected. Mainstream players might be quite happy to live within a model of plenary federal power, even during periods in which certain of their preferences are out of favor. If the Court's recent power-limiting rhetoric merely elevates the Tenth Amendment, it can be viewed as an illustration of this phenomenon—a predictable and unremarkable conservative adjustment of the plenary power structure. If the Court's power-limiting rhetoric prompts serious treatment of the embarrassing Second and the forgotten Ninth Amendments, then we might fairly consider *Lopez* to have genuinely prefigured a principled power-limiting constitutionalism.

#### IV. THE PARADOX OF PLENARY POWER: A CRITICAL RACE ANALYSIS AND A CRITIQUE OF VOICE

The majoritarian impulse to throw off conceptual restraints on collective power is understandable. Such restraints imply that we cannot trust ourselves to make prudent, sensible collective decisions—a contention that majority players might understandably reject. But for American minorities, distrust of unrestrained collective decisions, the danger of being on the ugly end of those decisions, resonates deeply. As a model for the future, plenary power constitutionalism offers nothing inherently attractive to minorities. Minorities must simply gamble on the direction of the majoritarian currents that drive it.

Brown people must acknowledge, of course, that roughly herded collective power grounds the vital statutory protections of the civil rights era. But if the mood of the majority shifts in a way that sends the fortunes of minorities into decline, the exercise of plenary power will be tethered to that shift. And we may be very troubled by the array of problems and necessities that this shift demands be addressed by the enormous power sited in Washington. This Part explores that paradox.

This Part has a second ambition that emerges concurrently. As I evaluate the paradox of plenary power, I engage orthodox race positions as well as ideas that run contrary to traditional views of minority interests. As I show, both critiques operate solidly within voice of color.<sup>123</sup> These critiques prompt consideration of the capacity of voice to drive doctrinal and other choices which I pursue in Part IV.C.

Part IV.A presents the unorthodox case, grounded in outsider perspectives,

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*Id.*

<sup>123</sup> As noted earlier, I appreciate but ultimately reject Jerome Culp's distinction between voice of color and black perspective. See Culp, *supra* note 7. My use of the term "voice" in this part also will encompass Culp's formulation of "black perspective."

for rejecting the plenary power model. Part IV.B is a more traditional evaluation concluding that the consequence for brown people of abandoning the plenary power model is a disqualifying danger. Part IV.C engages the question of voice utility raised by these conflicting outsider critiques. It argues that voice cannot dictate conclusions but remains valuable for the nontraditional paths it cuts through considerations of doctrine and policy.

### A. *Wrestling with Plenary Power*

American minorities might view plenary power constitutionalism as close to the worst of circumstances. If the severity of the problem, as perceived by the majority, is the practical source of federal power to address the problem,<sup>124</sup> then "rights" become merely rhetorical balms that soothe us in fair weather. This leaves minorities ensnared by the illusion of rights<sup>125</sup> and exposed to unrestrained exercises of majority power in the foul weather where we need rights most. But is this danger substantial enough and concrete enough to push minority allegiances away from the plenary power model and toward a more formalist constitutionalism<sup>126</sup>—a rendition (arguably unprincipled) of which many who have been open political enemies of brown people are currently associated?

Ultimately, even a serious power constraining constitutionalism may be nothing but a "parchment barrier"<sup>127</sup> to majoritarian excesses—a barrier just as illusory as the rights rhetoric I have criticized. As James Fleming has expressed:

"American constitutional interpretation takes for granted the elemental

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<sup>124</sup> See *supra* Part II; see also *supra* note 76 and accompanying text on Justice White's dissent in *New York v. United States*, 505 U.S. 144 (1992).

<sup>125</sup> See generally Derrick Bell, Jr., *A Holiday for Dr. King, The Significance of Symbols in the Black Freedom Struggle*, 17 U.C. DAVIS L. REV. 433 (1984) (suggesting that many laws purporting to advance minority rights are merely symbolic and lack real substance); Derrick A. Bell, Jr., *Private Clubs and Public Judges: A Nonsubstantive Debate About Symbols*, 59 TEX. L. REV. 733 (1981).

<sup>126</sup> See *infra* note 129.

<sup>127</sup> "Parchment barrier" was Madison's characterization of state bills of rights that had been "violated by overbearing majorities in every state." Johnson, *Beyond the Second Amendment*, *supra* note 92, at 28 n.80. Notably, Madison's concern seems to have been majoritarian tyranny damaging the interests of an elite minority of creditors. Eric Black presents in entertaining fashion the indications that our Constitution emerged as a limiting instrument aimed at controlling such "abuses of democracy." See ERIC BLACK, *OUR CONSTITUTION: THE MYTH THAT BINDS US* 45–58 (1988). It is ironic that those limitations may now be most useful to oppressed minorities.

preposterousness of its subject—the presumption that a political world can be constructed and controlled with words.” And, in the face of a determined political will, constitutions written or unwritten . . . may be “absurd attempts . . . to limit a power in its own nature illimitable.”<sup>128</sup>

The rhetorical fidelity to limited power that is more comfortably part of “traditional” constitutionalism<sup>129</sup> is therefore appealing only if principled<sup>130</sup> application of it puts a heavier trigger on majoritarian excesses. Is it reasonable to expect such fidelity to operate as a real barrier, a restraining commitment majorities must overcome before using their power to excess?

Such a barrier is very much in the style of the ideals critical race theorists argue helped shame America into the corrections of the Civil Rights era. In his most recent bibliography, Richard Delgado describes the effort to resist the critical legal studies disparagement of rights rhetoric as a major theme in critical race theory.<sup>131</sup> One of the earliest and most prominent of these projects is Kimberle Crenshaw’s qualified defense of rights rhetoric against critical legal studies trashing. She describes rights rhetoric as certainly flawed, indeed double-edged, but still a vital vehicle for minority advances:

[Crits suggest] that thinking in terms of rights is incompatible with feelings of solidarity and is not helpful in determining how to be politically effective. The expression of rights, however, was a central organizing feature of the civil rights movement. . . .

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<sup>128</sup> James E. Fleming, *We the Exceptional American People*, 11 CONST. COMMENTARY 355, 377 (1994) (quoting WILLIAM F. HARRIS, II, *THE INTERPRETABLE CONSTITUTION* 1 (1993) and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Earlier, Professor Fleming invokes John Rawls on the same point. *Id.* at 361. Fleming also offers John Hart Ely’s observation that, “[C]ourts will tend to be swept along by the same sorts of fears as citizens.” *Id.* at 376 n.94.

<sup>129</sup> I use “traditional constitutionalism” here to connote broadly a more formalist approach to constructing power boundaries and respecting individual rights. This vision puts great value on textual guides and restraints on power and would attempt to minimize the influence of contemporary politics, problems, and necessities.

The more that is endured (whether inconvenience, political disappointment, or social frustration) in fidelity to this ideal, the greater the capacity of the ideal to restrain future exercises of power that upon reflection people of goodwill would find troublesome.

<sup>130</sup> And there is a difference! For one thing, principled limits on federal power would require that both ends of the political spectrum sacrifice power interests. Thus, only a Ninth or a Tenth Amendment ascension is insufficient. The barrier to abuse of which I speak requires real collective self-discipline—the type that takes seriously those constitutional limitations and instructions we dislike until they are changed through the long, formal process of amending Article V.

<sup>131</sup> See Delgado & Stefancic, *Critical Race Theory* 1993, *supra* note 4, at 191.

...  
 ... As demonstrated in the civil rights movement, engaging in rights rhetoric can be an attempt to turn society's "institutional logic" against itself—to redeem some of the rhetorical promises and the self-congratulations that seem to thrive in American political discourse. . . .

...  
 ... Powerless people can sometimes trigger such a crisis by challenging an institution internally, that is, by using its own logic against it. Such crisis occurs when powerless people *force open and politicize a contradiction between the dominant ideology and their reality*.

...  
 Casting racial issues in the moral and legal rights rhetoric of the prevailing ideology helped create the political controversy without which the state's coercive function would not have been enlisted to aid Blacks. . . .

...  
 ... Perhaps the only situation in which powerless people may receive any favorable response is where there is a political or ideological need to restore an image of fairness that has somehow been tarnished.<sup>132</sup>

What Crenshaw and others describe<sup>133</sup> is the collective self-restraint that grows from cultural commitment to the ideal of rights, and the power of that ideal to transform a conflicting reality. Conceptual interdependence reveals cultural and institutional fidelity to the constitution's explicit power boundaries as the flip side to the rights coin.<sup>134</sup> Deep cultural and institutional conviction

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<sup>132</sup> Crenshaw, *supra* note 5, at 1364–68, 1381 (emphasis added). Crenshaw emphasizes that liberal reform, harnessing rights rhetoric, both “transforms and legitimates” the social order. *Id.* at 1370. Reliance on the restraining value of a limited power model seems similarly double-edged.

<sup>133</sup> See generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 149 (1991) (arguing that although rights may not be ends in themselves, rights rhetoric has been and continues to be an effective form of discourse for blacks); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (arguing that the U.S. government's support for desegregation and racial equality was motivated in part by the concern that racial discrimination harmed foreign relations, and that the U.S. could not effectively argue that democracy was morally superior to communism while still practicing segregation); Mary L. Dudziak, *The Limits of Good Faith: Desegregation in Topeka, Kansas, 1950–1956*, 5 LAW & HIST. REV. 351 (1987) (arguing that school board's integration effort was taken to distance itself from the “real” segregation in the south and thus was aimed primarily at protecting the majority community's self-image); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (arguing that critical legal studies' disdain for rights-based theory ignores the utility of rights-assertion to minorities).

<sup>134</sup> Such fidelity would, for example, operate in stark contrast to the current congressional practice of assuming the power to act and often failing even to identify the

that there will be immensely prudent and apparently necessary things that the Constitution flatly prohibits is vital to instilling the collective self-discipline that may be the core barrier to majoritarian abuses.<sup>135</sup> This cultural harness on collective power is, like rights rhetoric, a dangerous thing for American minorities to sacrifice.<sup>136</sup>

The effect of this harness is surely transitory. It is hard to know by how much cultural fidelity to substantive power boundaries will delay majoritarian excesses.<sup>137</sup> Certainly it is insufficient to continuously restrain a roughly-spurred majority. But with this guard in place, the majority will endure a harder kick—a keener perception of necessity—before unleashing its destructive power. Both conceptually and practically, this potential is such that brown people can move aggressively toward a more formalist power-limiting constitutionalism without phasing out of voice.

In contrast, the plenary power model not only is geared to unleash majoritarian excesses earlier,<sup>138</sup> it poses a quite independent danger. Karl

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purported constitutional source of the power enabling particular legislation. With the commerce power as a virtual rubber stamp, *see* Epstein, *supra* note 9, perhaps this is not surprising. Identifying and debating repeatedly and publicly the power source of federal legislation would be one small step toward institutional and cultural fidelity to power-limiting principles.

<sup>135</sup> Eric Black makes the point in a comparison between the United States and the former Soviet Union:

The Soviet Union has a Constitution. It guarantees democratic elections and a republican form of government. Soviet citizens have—on paper—most of the same constitutional rights and liberties as Americans.

. . . .

. . . We have a Constitution; they have a Constitution. Ours says freedom; theirs says freedom. Yet we believe that somehow ours produces real freedom and theirs doesn't.

BLACK, *supra* note 127, at 169.

Learned Hand put it more eloquently: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it." Learned Hand, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 190 (Irving Dillard ed., 3d ed. 1960).

<sup>136</sup> A commitment to respect certain rights when they are painfully expensive, a resolve to say we deeply wish to act but may not, and self-restraint in the face of exigency are valuable collective ideals. They would recognize collective power as a blunt instrument with great potential to do damage, even when wielded with good intentions.

<sup>137</sup> There is also no assurance that it will only delay "excesses" as minorities perceived them.

<sup>138</sup> This threat is no doubt submerged by the benefits American minorities have received

Llewellyn observed that "what one has been doing acquires in due course another flavor, another level of value than mere practice; a flavor on the level of policy or ethics or morality. What one has been doing, becomes the 'right thing to do.'" <sup>139</sup>

The danger of the plenary power constitutionalism is not just that the majority will abuse power earlier. The higher danger is that what is "necessary" becomes right, proper, and moral, leaving nothing at all to regret or re-examine. <sup>140</sup>

Baldwin commented that "no man is a villain in his own eyes." <sup>141</sup> Unrestrained by fidelity to power-limiting principles, majorities under the plenary power model are left to recognize their excesses by reference only to the measures of prudence or necessity. People for whom Baldwin's observation resonates, groups whose fortunes have turned on collective panic, <sup>142</sup> those who have been cast as a problem needing a solution, <sup>143</sup> might well find this lack of principled restraint troubling <sup>144</sup> enough to merit rejection of the plenary power

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from progressive policies supported by the plenary power model. But we must recognize the model is merely a tool. There is no reason to think it will be employed exclusively by progressives, or by wise progressives, or that progressive ideology is ultimately "best" for us.

<sup>139</sup> KARL LLEWELLYN, *THE BRAMBLE BUSH: ON THE LAW AND ITS STUDY* 71 (1950).

<sup>140</sup> True, the majority might amend the Constitution to achieve whatever it desires. The difference is that amendment logistically is so difficult and time consuming that it imposes a period of reflection and is resistant to panic in a way that mere congressional action is not.

<sup>141</sup> See Eugene B. Redmon, *The Way Love Never Dies*, in JAMES BALDWIN: *THE LEGACY* 91 (Quincy Groupe ed., 1989).

<sup>142</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944). One of my colleagues has lamented his students' lack of outrage at *Korematsu*. Of course I cannot say for certain what feeds their relative complacency. What I fear, however, is that their response reflects a level of comfort with the idea that our national government is empowered to and should do whatever necessary to address national problems and emergencies. By that standard, one need only concede that we were at war to find *Korematsu* unfortunate but unavoidable, and therefore relatively unproblematic.

<sup>143</sup> See WILLIAM S. McFEELY, *FREDERICK DOUGLASS* 371 (1992). McFeely writes: "Men talk of the Negro problem," Douglass roared. "There is no Negro problem. The problem is whether the American people have loyalty enough, honor enough, patriotism enough to live up to their own constitution." *Id.*

<sup>144</sup> See also Robert Williams's critique of Congress's express plenary power over Native Americans. Discussing some of the evils committed in the name of that power, he argues that history cannot be swept aside with the counsel to "trust us." See Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439, 439 (1988); see also Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1258-61 (1992) (arguing that the marketplace of free speech intensifies rather than relieves



model in favor of principled application of more formalist conceptions of the constitution's power-limiting role.<sup>145</sup>

Rebecca Brown's tribute to Justice Marshall underscores the point. Discussing Marshall's formalist sympathies and noting that formalism is an "odd slant" for a social revolutionary, Brown describes the impulse for Marshall's particular brand of formalism:

[Marshall] combined the principled righteousness of formalism with the wisdom of realism, creating a jurisprudence that is entirely his own. . . .

But Justice Marshall appears to recognize that "formalism is only superficially about rigidity and absurdity. More fundamentally, it is about power and its allocation." One of his principles mandates that rules be obeyed because, on balance, adherence to rules tends to help those without power, while discretion in the hands of the powerful is a frightening thing. Rules are rules. "It is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law."<sup>146</sup>

### B. *Outsiders, Outcasts, and the Risks of Our Traditional Power-Limiting Structure*

As a practical political matter, revival of federal power boundaries, the risks of a more formalist, power-limiting structure, and the potential ascension of the outcast provisions might be viewed as offering American minorities very little. The racist baggage of states' rights—the indelible image of George

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the predicament of American minorities and that the "empathic fallacy" encourages the erroneous belief that free expression will remedy racism and other deeply inscribed social ills).

<sup>145</sup> This discussion focuses of course on federal power restraints. Arguably, for most of our history in this country, dangers to minorities came in the form of individual, local, state, and regional exercises of power. The power balance now has profoundly shifted, and we are warranted in asking whether the federal mechanism is susceptible to similar abuse. After the corrections of the reconstruction amendments and the civil rights era, and considering the new challenges we face as a polity, minorities now can fairly reconsider the utility of the original limitations on federal power.

Consider for a moment the operation of the plenary power model prompted by majoritarian fears sufficient to give someone a step to the right of Pat Buchanan a mandate to restore the good ole days in America. Fenced borders might be one of the milder aspects of such a program. Brown people in particular might find other measures deemed "necessary" (and therefore proper within the plenary power structure) by such leadership to solve national problems to be deeply disturbing.

<sup>146</sup> Rebecca L. Brown, *A Tribute to Justice Thurgood Marshall: Or: How I Learned to Stop Worrying and Love Formalism*, 1 TEMPLE POL. & CIV. RTS. L. REV. 7, 16-17 (1992) (citations omitted).

Wallace standing at the school house door and contemplation of the modern social and political landscape absent federal intervention—alone might be sufficient to sustain minority adherence to plenary power constitutionalism that reduced states' rights to rubble.<sup>147</sup>

Depending on whether one is a rural minority for whom public security resources are more demonstrably irrelevant to individual safety<sup>148</sup> or an urban minority besieged by crime and grasping for solutions, an outsider perspective

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<sup>147</sup> We should appreciate however, that one very good test of whether we are guided by principles rather than simply preferences is whether we adhere to results to which we are led, even those we do not necessarily like. Christopher Eisgruber has called this "Henry Monaghan's 'no pain no claim' test." (The idea that a constitutional theory loses credibility unless its advocate suffers some pain by acknowledging it does not achieve everything he would like.) See Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1, 7 (1993) (discussing Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 53, 395 (1981)).

But even assuming the Tenth Amendment offers brown people nothing but trouble, is that sufficient to force us irretrievably into the arms of the plenary power model? With the drastic changes we witnessed in Washington after November 1994, a model which limits federal power and offers options to hospitable states has some appeal. See also McFEELY, *supra* note 143, at 255:

What Douglass meant by this impatient statement was that the Civil Rights Act of 1866 and the proposed Fourteenth Amendment did not give a "final" answer to his immense question. Curiously, he did not view the answer as coming from vigorous federal enforcement of those remarkable measures. Instead this black abolitionist looked to states' rights, of all things: "The arm of the Federal government is long, but it is too short to protect the rights of individuals in the interior of distant states. They must have the power to protect themselves." The power would be theirs when African Americans had the vote and could elect sympathetic local and state officials.

*Id.* Throughout this account, McFeely shows Douglass benefiting from hospitable state enclaves.

Whether brown people benefit from plenary federal power depends on who is employing it. If our friends are in power then maybe we can expect national policy to force states into conformity with uniform standards of equality and fairness. But the reverse is true as well. If, nationally, minority fortunes are on the decline, we might expect moves toward uniformity that run against our interests. I have commented earlier on the risks to brown people of an untethered federal power wielded by a "radical right regime with a mandate to 'restore America to the traditions that made it great.'" See Johnson, *supra* note 21, at 575 n.119. Contemplate, for a moment, the agenda of a deeply conservative regime, on the offensive, wielding the sword of plenary power. Might we at some point look favorably upon individual states' latitude to adopt a progressive race agenda, building on a base of remedial measures being neglected at the federal level?

<sup>148</sup> See Johnson, *Beyond the Second Amendment*, *supra* note 92, at 23–25 nn.63, 67.

might yield different conclusions about the individual rights view of the Second Amendment.<sup>149</sup> A rural perspective<sup>150</sup> might well leave one troubled by the ironic analytical foundation of liberal gun prohibition advocacy—which among other things proposes federal prohibitions that would leave minorities security-dependent on the very state and local powers that still cause many to shudder at the mention of “states’ rights.”<sup>151</sup> Many urban minorities, with at least symbolic political representation, besieged by the message that only cops and criminals have any connection to guns, might view armed self-help as wholly foreign.<sup>152</sup> And, even an alternative view of the Second Amendment, casting the militia as a manifestation of republican virtue but dismissing the value of individual self defense, which some might argue can be drawn from a principled formalist constitutionalism, may hold little attraction for many minorities.<sup>153</sup>

The Ninth Amendment appears to hold the most promise for American minorities, particularly if one views the Ninth Amendment as a source both of positive rights to government services<sup>154</sup> and unenumerated fundamental rights

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<sup>149</sup> See Robert J. Cottrol & Raymond T. Diamond, *Revitalization of the Militia of the Whole, A Step in Rebuilding Republican Virtue in Inner-City Minority Communities* (1995) [hereinafter Cottrol & Diamond, *Revitalization*] (unpublished manuscript, on file with author) (arguing for revival of the militia of the whole as a component of revitalizing blighted minority communities).

<sup>150</sup> See generally Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991) [hereinafter Cottrol & Diamond, *Reconsideration*].

<sup>151</sup> See also Johnson, *Beyond the Second Amendment*, *supra* note 92, at 57 n.181.

<sup>152</sup> The same political currents that supported George Wallace at the school house door also contributed to a decline in Second Amendment protections for brown people. Professors Cottrol and Diamond chronicle a history of racist disarmament efforts aimed at leaving brown people defenseless and subservient. See generally Cottrol & Diamond, *Reconsideration*, *supra* note 150; Robert J. Cottrol & Raymond T. Diamond, “Never Intended to Be Applied to the White Population”: *Firearms Regulation and Racial Disparity—The Redeemed South’s Legacy to a National Jurisprudence*, 70 CHI.-KENT L. REV. 1307 (1995) [hereinafter Cottrol & Diamond, *Firearms Regulation*]. Disarmament has been a common expression of majoritarian apprehension about “others.” This apprehension is illustrated in Joyce Malcolm’s history of a decline of the English right to bear arms corresponding to an increasingly heterogeneous population and decline of shared ideology. See MALCOLM, *supra* note 92, at 170–71. David Kopel identifies a similar majoritarian apprehension as a unifying theme in the disarmament efforts of various nations. See generally DAVID KOPEL, *THE SAMURAI, THE MOUNTIE AND THE COWBOY* (1993).

<sup>153</sup> But see Cottrol & Diamond, *Revitalization*, *supra* note 149.

<sup>154</sup> In a substantial way, progressive constitutionalism should resonate for American minorities. Raoul Berger’s critique of it explains why: “Implicit in [Suzanna] Sherry’s fancy theorizing [about the rights creating judicial activism invited by the Ninth Amendment] and

operable against states. But as discussed above, a traditionalist construction of the Ninth Amendment could avoid that outcome by constraining it to its residual rights conception.<sup>155</sup>

Perhaps the most compelling reason for minority support of the plenary power model is that modern civil rights statutes are grounded on an expansive reading of the Commerce Clause—a reading that is the foundation of plenary power constitutionalism.<sup>156</sup> While it might be possible to sustain parts of this agenda through a generous reading of the Fourteenth Amendment, we must recognize that the difficulty of regulating private action from a Fourteenth Amendment base was a central reason for grounding the Civil Rights Act of 1964 on the Commerce Clause.<sup>157</sup> Gerald Gunther suggests that the Thirteenth Amendment, at least as construed subsequently, might now support the 1964 Act's ambitions to regulate private action.<sup>158</sup> Even so, it seems vastly less equipped than the modern Commerce Clause to support a progressive race agenda for the future.<sup>159</sup>

Moreover, even if minorities resolve concerns about ascension of the outcast provisions and the condition of civil rights legislation, there remains the risk that one will be appropriated as a colored poster child<sup>160</sup> who, by criticizing the plenary power model, validates an agenda that ranges beyond the

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that of her fellows is a confession of failure to obtain from the people the measures they desire." Berger, *supra* note 80, at 60–61.

<sup>155</sup> See *supra* Part II.A.2.

<sup>156</sup> Rogers Smith contends, "The Court's affirmation of the Civil Rights Act [of 1964] confirmed the disappearance of any real limits on the commerce power." ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 162 (1985).

<sup>157</sup> See GERALD GUNTHER, *CONSTITUTIONAL LAW* 145–51 (12th ed. 1991).

<sup>158</sup> *Id.* (citing the Supreme Court's construction of the Thirteenth Amendment in *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968)).

<sup>159</sup> There are other pathways through which we might try to respect limits on collective power and still sustain the special steps necessary to push America to some semblance of adherence to its founding ideals; none of them are entirely satisfactory. One route to sustaining these things in a limited power model would be a recognition of and scrupulous adherence to an idea presented roughly in *Fry v. United States*, 421 U.S. 542 (1976)—the temporary expansion of federal powers in narrowly circumscribed cases that qualify as true emergencies. The difficulty is that those members of the majority who would concede the need to heal the wounds of our racist past are also likely to lose their discipline and argue that many other social problems are also qualifying national emergencies. And one suspects that those who would apply this temporary emergency power with any discipline would be insensitive to the contention that racism presents such an emergency.

<sup>160</sup> Both liberals and conservatives have wheeled out the colored poster child. The differences are that liberals seem to take him for granted, and the liberal political agenda presents fewer outright affronts to brown people.

choice of constitutional models.<sup>161</sup> In theory, that problem yields to clear boundaries between one's support of the traditional power-limiting ideals of the Constitution and aspects of conservative ideology deemed objectionable. As a coarse political matter, such distinctions may be too subtle to function.<sup>162</sup>

It is then difficult to conclude that minority adherence to the plenary power model is an unsound choice. Indeed, it is very easy to understand how it has become the centerpiece of orthodox views of good political strategy.

### *C. Toward a View of Voice Utility*

The plenary power model and formalist power-limiting constitutionalism are both worrisome. A preference for either has implications across a multitude of race and class issues. A critique of these options in the voice of color does not generate a "correct" choice. This result is one indication that voice is ill-equipped to drive doctrinal choices.

But the choices prompted by the plenary power paradox, while broad in their implications, do not cover the field of social, political, and doctrinal choices that critical race scholars can fruitfully engage in voice. Evaluation of that larger constellation of choices might show that the dilemmas presented by plenary power constitutionalism do not indicate a general inability of voice to drive results. And I happily concede that the critical empirical analysis that this question requires should be only one facet of a broad debate about the capacity of voice to dictate results.

My aim here is to prime that debate through an argument that moves toward verifying the broad claim that voice is not equipped to compel results. The argument calls on knowledge that grows from the bond of which DuBois spoke—"[something] between us that constitutes a tie which I can feel better than I can explain"<sup>163</sup>—something at a deep level we always have known. Ironically, a good illustration comes through an evaluation of two American minorities who have come to symbolize voice and antivoice: Derrick Bell and Clarence Thomas.

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<sup>161</sup> This problem is recurrent when brown people step outside their traditional ideological corral. For example, I am sure that Derrick Bell's provocative suggestion that Civil Rights lawyers abandon their preoccupation with integration at any cost and instead pursue their clients' wishes for a better education for their children, would delight many white separatists. See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

<sup>162</sup> It seems brown people are allowed much less divergence from the traditional liberal agenda than whites before being kicked out of camp and labeled conservative. Liberals demand more of their poster child.

<sup>163</sup> DAVID LEVERING LEWIS, W.E.B. DuBOIS: BIOGRAPHY OF A RACE 15 (1994).

Social scientists Clayton P. Alderfer and David A. Thomas have observed that minorities utilize a variety of coping strategies to deal with racism. One of these is denial.<sup>164</sup> I witnessed this style of coping through the performances of my paternal grandmother, who took it to the point of inversion. Sitting in the middle of Appalachia, she still speaks with condescending sympathy of "the poor white folks" and their unenviable position in the universe.<sup>165</sup> Justice Thomas and many others are engaged in a similar denial strategy with profound policy implications.<sup>166</sup> The denial strategy substantially impacts individual social, political, and doctrinal choices pushing "color blind" decisions in a severely color conscious society.<sup>167</sup>

Derrick Bell offers a different but equally troublesome coping strategy. He suggests that brown people simply come to grips with their inevitable subordination and work to find ways to make their subordinate existence bearable.<sup>168</sup>

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<sup>164</sup> See Alderfer & Thomas, *supra* note 5, at 9.

<sup>165</sup> I do not use "denial" as a pejorative. A more typical rendition is described in a short report on Alma Powell: "She succeeded in part because she was mentored by powerful, directed adults who never for a moment considered themselves inferior to anyone." Eric Pooley, *Why Alma Didn't Want the Job*, TIME, Nov. 20, 1995, at 50 (reporting Colin Powell's decision not to run for President).

<sup>166</sup> The strategy often is embellished with the idea that one's response to current episodes of racism should be the equivalent of the Mike Schmidt response to the cooked ball. If they cook the ball, the best response is just to powder it. Steven Carter has noted that those who have benefited most from affirmative action were in the best position to respond to the cooked ball by at least making contact. See STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 71-84 (1991). It should be no mystery that some of these people employ the denial coping strategy. The very idea of affirmative action clashes with the denial strategy, so its role is diminished, disparaged, condemned. Of course this presupposes someone with a fair chance to powder the cooked ball. And that is why denial is controversial. The ball is so severely cooked that many of us cannot even make contact.

<sup>167</sup> One alternative to this denial coping strategy is the degrading but essential exhibition of one's wounds and misery in order to extract sympathy, assistance, and reparation. This alternative has been a discouragingly essential part of the traditional civil rights response to the legacy of slavery and racism.

<sup>168</sup> See Derrick Bell, Jr., *Racial Realism*, 24 CONN. L. REV. 363, 377 (1992). The extensions of Bell's strategy (to expect inequality and not wear oneself out fighting inevitable racism) threaten a central component of individual achievement—the will to continue when things look bleak. One of the things that permits people to push through barriers is a sense that the barrier can be broken. Under Bell's strategy we lose that sense of the possible. And worse, we are encouraged to face even weak obstacles with a sense of predestined failure.

Several of my most memorable "racial incidents" of the past few years I have produced for myself. Each involved my joining one private sporting club or another (hunting, shooting, archery, swimming) in venues where I was a very distinct minority. Before proceeding, I

Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary "peaks of progress," short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it and move on to adopt policies based on what I call: "Racial Realism." This mindset or philosophy requires us to acknowledge the permanence of our subordinate status.<sup>169</sup>

This strategy is decidedly retrograde. The first encounter with it that I recall in detail was as a child in the car with one of my uncles on the way to Sunday school. My uncle muttered under his breath as a fellow we knew waved happily while running a stop sign in front of us. I had recently learned the meaning of the letters on the red and white sign, and announced, "He can't do that!" My uncle looked at me gravely and said, "That man can do whatever he wants. That man is a white man." He was reminding me of something much more serious than the rules of the road. It was a realist survival lesson, somewhat contrived, about "how things are," that diminished and hardened my young self image.

This experience was the foundation of a stack of confirmations that I should not expect the benefit of the golden rule, standard social courtesies, welcome signs, and advertisements to "come on down."<sup>170</sup> These ego-corroding survival

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contemplated and steeled myself for potential hostilities. I was prepared for conflict and in a correspondingly foul mood. Ultimately, the only unpleasant things were those that I had anticipated in preparation for battle. The reality was benign.

Importantly, my expectations were laced with a core sense that, while I might be in hostile territory, I was at least equal to my putative adversaries and could make powerful demands for equal treatment. Had I accepted the "reality of my subordination," I might well have simply stayed home and avoided the demons of my anticipation.

I use these examples not to diminish continuing real incidents of racism, but to emphasize the power of those we imagine. My recent encounter with four jack-booted thugs of the New York City Police Department—where I played the standard role of the black male who "looks just like somebody"—replenished my cache of real racial incidents. Although I told them my name, they dubbed me "Buck." The threatening response when I objected to this mode of address was the first point at which I became really afraid. As they talked over me, my captors made clear their conviction that, even if I hadn't done this, I had "done something." The uniformed officer in the front seat found my complaints about the tightness of the handcuffs hilarious. My next meeting with these mammals will be before a judge: but on my initiative. This time, they will be the suspects.

<sup>169</sup> *Id.* at 373–74.

<sup>170</sup> Later, when I suggested we actually go to one of those places that invited everyone to "come on down," another relative explained, without any trace of bitterness, as if he were discussing the sun coming up, "That doesn't mean us." He had come to grips with his subordination.

lessons cautioned that the game is rigged and implied that to play could only yield disappointment. Many of us might conclude that the doctrinal, political, social, and personal choices that seem to flow from such convictions are troublesome.<sup>171</sup>

Bell's realism and Thomas's denial are both old saws. Both are renditions of strategies brown people traditionally have used to cope with racism. They compel a divergent array of political, doctrinal, and social choices. Most importantly, both reflect the truly desperate nature of our common efforts to cope with racism and a cacophony of racist signals, explicit, inferred, and imagined, that minorities encounter daily.<sup>172</sup>

That we can understand both approaches as the outgrowth of unremarkable reactions to racism is instructive. These common but drastically different coping strategies show that brown people are, to different degrees and in different ways, struggling painfully at the intersection of the broad phenomenon of racism, our particular race experiences, and the multitude of individual qualities and traits that influence our reaction to those experiences. It is this complex intersection of characteristics and stimuli that form voice. Voice surely prompts us to engage particular issues more fully, and to wrestle harder with particular social, political, and doctrinal choices. But it is difficult to conclude that voice in all its complexity is equipped to dictate for minorities uniform social, political, or doctrinal preferences or to construct an orthodoxy of color.<sup>173</sup> It is

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<sup>171</sup> I recognize fully the conflict between my grandmother's lesson and that of my uncle. And I appreciate the difficulty of successfully implementing the denial strategy unless one never leaves the house. The conflict illustrates that these coping strategies are substantially acts of desperation, not coherent strategic systems.

<sup>172</sup> Which message is more hazardous as a brown child's roadmap through modern America? While most of Bell's statement is the essence of despair, his final vision is, while clouded, finally hopeful. By acknowledging our inevitably subordinate status, we might "avoid despair and [free ourselves] to imagine and even implement racial strategies that can bring fulfillment and even triumph." Bell, *supra* note 168, at 373-74. In this hope Bell is no different from others along the spectrum of political views—all of them hoping against hope that the desperate unlikely paths they are cutting will lead to triumph. In this hope, Bell's realism, Thomas's bootstrap philosophy, *see id.* at 370 (discussing Thomas's bootstrap philosophy), and the civil rights organizations Bell describes as "unhappily . . . committed to the ideology of racial equality," *id.* at 377, have much in common. If we acknowledge and celebrate it, this core commonality might be enough to draw us together at least long enough to recognize we are all working on the same problem. Our disparate strategies may be noncomplementary; they may clash frontally. Yet they are driven by the same impulse. As Bell points out, none of us yet has devised a winning strategy. And it is a very sound bet that no single strategy will be the answer for tens of millions of brown people. It seems essential that our collective kit of strategies includes more than one pattern.

<sup>173</sup> The bar to an orthodoxy of color may be a purely practical one. Even if we all have



more likely that our preferences among disparate choices are a product of the collision between our peculiar race experiences and all the things that make us unique individuals.<sup>174</sup>

As we can observe from a parallel struggle in feminist legal theory,<sup>175</sup> none of this diminishes the importance of voice. Tracy Higgins describes the efforts of feminist scholars who have contended with the criticism that there can be no single "feminist truth."<sup>176</sup> A dominant response is that feminism should be a privileged voice because the process of feminist critique may, for example, raise consciousness and thereby more completely reflect women's experiences

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similar experiences, we all cannot react the same way, and our experience is only roughly similar. Compare the diverse responses of students to the relatively controlled, intense experience of the first year in law school. *See also* Alderfer & Thomas, *supra* note 5, at 3 (discussing the tremendous effect of group pressure on how individuals perceive subjective and objective phenomena). Many arguments about people phasing in and out of voice are caused by someone's departure from the views of the pressure group. Particularly in academia, this individual departure is not surprising, since one of the coping styles that helps individuals resist group pressure is "great confidence in [one's] own judgment [and withdrawal] from group pressures." *Id.* The nature of the academy and of the people drawn to it correlate highly with this coping mechanism.

<sup>174</sup> This idea seems no different than Robin Barnes's observation that there is no typical black woman law professor, even though many in the academic world expect black women professors to hold similar views. *See* Robin D. Barnes, *Black Women Law Professors and Critical Self Consciousness: A Tribute to Professor Denise S. Carty-Bennia*, 6 *BERKELEY WOMEN'S L.J.* 57 (1990-1991).

Some critical race scholars have taken a contrary position, seeming to suggest this problem is one of adequate definition of categories. *See generally* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990) (criticizing Robin West and Catharine MacKinnon for implicitly assuming the commonality of all women and failing to appreciate the distinct identity of black women). The same critique applies to a grouping of all black women.

My own rendition of Harris's tune is that current critical race theory is tinged by an urban bias and fails to take proper account of the subcategory of rural, Bible-Belt minorities. If we keep winding this machine, eventually we describe the full combination of traits, experiences, and characteristics that produce the divergent reactions to racism that cleave us. This does not invalidate, but does constrain, the scope of our efforts to generalize about perspectives of color. Giving proper recognition to our differences, we can say that American minorities have had a roughly similar encounter with racism. That experience, broadly speaking, will heighten our sensitivity to a wide range of questions, problems, and impulses. But it is an extraordinary leap to conclude that these rough similarities will dictate precisely how we engage those questions, problems, and impulses.

<sup>175</sup> Alex Johnson contends that "much can be learned from a comparison of Critical Race Theory and Feminist Theory." Johnson, *supra* note 6, at 2062.

<sup>176</sup> *See* Tracy Higgins, "By Reason of Their Sex": *Feminist Theory, Postmodernism, and Justice*, 80 *CORNELL L. REV.* 1536, 1588 (1995).

less distorted by patriarchy.<sup>177</sup>

While the idea of an orthodoxy of color is as dubious as a feminist orthodoxy, exercises in voice, like feminist critiques, remain vital. The important thing is that the trails they cut toward particular conclusions may be decidedly unorthodox, revealing new pathways through doctrinal or policy schemes.<sup>178</sup> More likely it is the pathways it creates, *not* the conclusions rendered, that ultimately will prove the value of voice.<sup>179</sup>

## V. CONCLUSION

From a majoritarian perspective, plenary power constitutionalism might be relatively unproblematic and even attractive. It presents rights as necessarily flexible barriers on collective power, restraining conceptions to be laid aside where they obstruct prudent, necessary uses of power. And, indeed, it has generated an array of benevolent and beneficial exercises of power that have advanced minority interests. But there is nothing about it that commands or guarantees such results.

Minorities, who have benefited from the exercise of power that we do not control, are forced to gamble on how that power will be used next.<sup>180</sup> Our social, doctrinal, and policy preferences are merely working experiments that incorporate our wagers about future uses of this power. It seems inevitable that our strategies and our wagers will differ, and in combination with all the things that make us different, will produce a broad array of divergent preferences and choices.

Brown people share one thing. We are all, to varying degrees, playing against the house. This commonality is insufficient to produce unified strategies. But it ought to be enough to keep us talking with and helping one another despite our differences.<sup>181</sup>

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<sup>177</sup> *Id.* at 1588-89.

<sup>178</sup> See, e.g., Cottrol & Diamond, *Revitalization*, *supra* note 149; Cottrol & Diamond, *Firearms Regulation*, *supra* note 152.

<sup>179</sup> If the debate in the social sciences is any indication, we will continue to argue over the existence and importance of voice of color, notwithstanding Alex Johnson's declaration that the question is settled. See Johnson, *supra* note 6, at 2061-62; Alderfer & Thomas, *supra* note 5, at 23-26 (noting that, from the early 1970s through today, the importance of the researcher's racial identity on his research has been hotly debated).

<sup>180</sup> Morton Horwitz argues that "rights are a double edged sword." See Horwitz, *supra* note 104, at 396 (responding to minority scholars' challenge of critical legal studies criticisms of rights theories). But powers are also double edged.

<sup>181</sup> One of the obvious themes of this project has been the validation of departures by brown people from traditional political allegiances. Partly this is geared to do the good work

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of stereotype busting. But very candidly, my own movement away from traditional allies on the left has been prompted significantly by liberal disparagement of the Second Amendment and denigration of the value of self-help in the pursuit of individual security. My perspective on this issue is driven by my formative experiences as a statistically insignificant minority in the West Virginia mountains. My journey in America since leaving those mountains has only bolstered my conviction that the personal capacity to mount a violent defense to physical threats to my family and myself is the very last thing I will sacrifice to lofty social experiments or utopian political agendas. I have written in detail why I think the liberal dream of safety for all of us, through gun regulation and gun prohibition, is a pipedream that is impossible to implement and will make things worse. See generally Johnson, *Shots*, *supra* note 92; Johnson, *Beyond the Second Amendment*, *supra* note 92; Nicholas J. Johnson, *Gun Controls—in America?*, THE PUB. INTEREST L. REV. 207 (1993) (reviewing KOPEL, *supra* note 152).

Ironically this conviction and my scholarship supporting the individual rights view of the Second Amendment has pushed me toward political allegiances with some of the very people who prompt my desire for a means to respond in kind to violent threats. But more than that, it has pushed me away from what I have come to view as bothersome, wrongheaded, and damaging liberal paternalism—away from that, but toward what? As I watched the phenomenon of Colin Powell while working on this Article in the fall of 1995, I was hopeful that I saw glimmers of an answer. But during the winter of 1996 I digested the frightening spectacle and rhetoric of Pat Buchanan.

On these issues my skin is thicker than most. But I find myself increasingly skeptical about the capacity of popular political conservatism to treat race issues with even a modicum of sensitivity. I am equally skeptical about its capacity to produce the culture of principled collective self-restraint that I have argued is a vital component in the protection of minority interests. This skepticism does not change my critique of the danger of plenary power. Indeed it underscores the danger of such power when driven by fear and anger and harnessed by demagogues.

My heightened skepticism does change one thing. I am no longer willing (either in the interest of stereotype busting or out of resentment against liberals who rush to kick me out of the club for my Second Amendment views) to permit the inference that my work reflects broad sympathies with the conservative agenda in its current configuration. I guess I must continue voting for myself.

